No. 16-1150	
Title:	**Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust, Petitioner** **v.** **Samuel Hall, et al.**
Docketed:	March 23, 2017
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(15-1564)
Decision Date:	February 10, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 17 2017	Petition for a writ of certiorari filed. (Response due April 24, 2017)
Apr 20 2017	Waiver of right of respondents Samuel Hall, Jr. and Hall & Griffith, P.C. to respond filed.
May 09 2017	DISTRIBUTED for Conference of May 25, 2017.
May 15 2017	Response Requested. (Due June 14, 2017)
Jun 14 2017	Brief of respondents Samuel Hall, Jr. and Hall & Griffith, P.C. in opposition filed.
Jun 28 2017	DISTRIBUTED for Conference of September 25, 2017.
Jul 11 2017	Reply of petitioner Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust filed. (Distributed)
Sep 28 2017	Petition GRANTED.
Nov 13 2017	Brief of petitioner Elsa Hall filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 13 2017	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**

Nov 17 2017	SET FOR ARGUMENT ON Tuesday, January 16, 2018
Nov 22 2017	CIRCULATED
Dec 13 2017	Brief of respondents Samuel Hall, et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 18 2017	Record requested from the U.S.C.A. 3rd Circuit.
Dec 19 2017	Brief amici curiae of Retired United States District Judges filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 28 2017	The record from the U.S.C.A. 3rd Circuit is electronic.
Jan 08 2018	Reply of petitioner Elsa Hall filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Argued. For petitioner: Andrew C. Simpson, Christiansted, V. I. For respondents: Neal K. Katyal, Washington, D. C.

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RECORD AND BRIEFS

16-1150

No. _____

FILED
MAR 17 2017
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ELSA HALL,
as personal representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The deadline for filing an appeal has "jurisdictional consequences" and "should above all be clear." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). The deadline is measured from the entry of final judgment. 28 U.S.C. § 1291; Fed. R. App. P. 4. Despite the need for clarity, for at least forty-five years the courts of appeals have disagreed as to when their jurisdiction attaches if cases are consolidated and a final judgment is entered in only one of the cases.

The split and lack of clarity have widened with the passage of time—there are four different circuit rules for determining appellate jurisdiction in consolidated cases. This Court has twice set out to resolve the four-way split. The Court granted certiorari in *Erickson v. Maine Central Railroad Co.*, 498 U.S. 807 (1990); but subsequently dismissed the petition. 498 U.S. 1018 (1990) (mem.). The Court again granted certiorari—and partially addressed the split—in *Gelboim v. Bank of Am. Corp.*,135 S.Ct. 897 (2015).

Gelboim held that for cases consolidated in multidistrict litigation, a final judgment in a single case triggers the "appeal-clock" for that case. But, by limiting its holding to multidistrict litigation, *Gelboim* left the split unresolved for cases consolidated in a single district under Fed. R. Civ. P. 42.

The question presented is:

Should the clarity *Gelboim* gave to multidistrict cases be extended to single district consolidated cases, so that the entry of a final judgment in only one case triggers the appeal-clock for that case?

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OPINION BELOW

The Third Circuit Court of Appeals decision appears in the Appendix to this petition at A-1.

JURISDICTION

The Third Circuit filed its decision on February 10, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Third Circuit's decision on a writ of certiorari.

STATUTORY PROVISION AT ISSUE

28 U.S.C. § 1291 provides, in relevant part:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . and the District Court of the Virgin Islands . . . ."

STATEMENT OF THE CASE

In May 2011, Ethlyn Hall ("Mrs. Hall") sued her son, Samuel H. Hall, Jr. ("Samuel") and his law firm, Hall and Griffith, PC, (collectively "Respondents") for conversion, malpractice, fraud and related torts. The primary focus of the lawsuit was approximately one million dollars in rent that Samuel collected on behalf of his mother. Samuel claimed that he had his mother's permission to use a substantial portion of this money to build an expensive vacation rental property on St. John, U.S. Virgin Islands. Mrs. Hall asserted that Samuel had converted the money and demanded it back.

Mrs. Hall sued in her individual capacity and in her capacity as the trustee of her *inter vivos* trust. The case was filed in the District of the Virgin Islands as Case No. 3:11-cv-54 ("11-54").

The progress of the case was delayed by procedural motions and during that delay, Mrs. Hall died. Mrs. Hall's daughter, Elsa Hall ("Elsa"), was appointed the administrator of Mrs. Hall's estate; and, under the terms of Mrs. Hall's trust, became the trust's successor trustee. In January 2013, Elsa (in these representative capacities only) was substituted as the plaintiff via an amendment to the complaint and continued her mother's lawsuit against Respondents. The Respondents answered the amended complaint, and Samuel asserted a counterclaim against Elsa in her representative capacities;[1] however, he alleged conduct (such as exercising undue influence over Mrs. Hall and alienating the relationship between Mrs. Hall and Samuel) that could only have occurred while Mrs. Hall was alive. As Elsa only assumed the representative capacity roles after Mrs. Hall died, she could not have committed these acts in a representative capacity.

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[1] The counterclaim was ostensibly against Elsa in both her representative and individual capacities. But, since Elsa was not a plaintiff in her individual capacity, there was no basis to file a counterclaim against her individually. *See, e.g., Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966) (holding that a person who sues in an "official or representative capacity is, in contemplation of law, regarded as a person distinct from the same person in his individual capacity and is a stranger to his rights or liabilities as an individual.")

Samuel eventually realized that the claims he wished to assert against Elsa needed to be filed against her in her individual capacity. He initiated a separate lawsuit in the District Court of the Virgin Islands against Elsa individually. (Case No. 3:13-cv-95) ("13-95"). That lawsuit made the same allegations against Elsa in her individual capacity that Samuel had previously made against her in her representative capacities in the counterclaim in 11-54.

Samuel moved, in 13-95, to consolidate that case with 11-54. The basis for the consolidation was the similarity of the allegations in Samuel's counterclaim in 11-54 and the allegations in Samuel's complaint in 13-95. On February 14, 2014, the district court granted the motion. The consolidation order did not specify whether the consolidation was for discovery, for trial, or for all purposes.

As the cases neared trial, Elsa in her representative capacities moved to sever the cases on the grounds that there were few overlapping facts and that there was a substantial likelihood that the jurors would be confused and unable to distinguish between Elsa in her representative capacities and Elsa in her individual capacity. The trial court never ruled on that motion and the cases were tried together. Throughout the litigation, separate counsel represented Elsa in her two separate capacities.

At the start of the trial, the district court concluded that substantial portions of Mrs. Hall's claims (including the conversion claim) did not survive her death and dismissed them *sua sponte*. The jury returned a verdict against Elsa in her representative

capacities on the few remaining claims. The jury also returned a verdict against Elsa in her individual capacity, awarding Samuel $500,000 in compensatory damages and $1.5 million in punitive damages.

On February 4, 2015, the district court entered separate judgments in each case. In 11-54, the judgment specified that "the plaintiff recover nothing [and] the action be dismissed on the merits."

On March 4, 2015, Elsa filed a motion for a new trial in the case against her individually (13-95). On March 5, 2015, Elsa in her representative capacities filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit in 11-54.

Respondents moved to dismiss the appeal, asserting that the final judgment entered in 11-54 was not final because there was not yet a final judgment in 13-95 (due to the pendency of the Fed. R. Civ. P. 59 motion for new trial filed in that case). Initially, the Third Circuit placed the appeal on suspense, waiting to see what transpired with the motion for new trial. A year later, on March 30, 2016, the district court granted the motion for new trial and vacated the verdict against Elsa individually. Although Samuel moved to reconsider the order granting the new trial, the Third Circuit decided to move forward with the appeal in 11-54. The case was fully briefed and the court heard oral argument on December 12, 2016.

On February 10, 2017, the Third Circuit dismissed the appeal for lack of appellate jurisdiction. The motion for reconsideration in 13-95 remains pending, although the new trial is scheduled for April 4, 2017.

REASONS FOR GRANTING THE PETITION

A. The four-way split in the circuits

This case allows the Court to resolve a forty-five year,[2] four-way, circuit conflict involving every court of appeals. Circuit geography should not determine a party's right to appeal from a final judgment entered in a consolidated case. Every single circuit has weighed in on the issue. Indeed, all but one of the circuits (the Eleventh) has remarked on the existence of the split. *See Albert v. Maine Cent. R.R. Co.*, 898 F.2d 5, 7 (1st Cir.) (stating that "[o]ther courts have taken different approaches to this issue"), *cert. granted sub nom, Erickson v. Maine Cent. R.R. Co.*, 498 U.S. 807, *cert. dismissed*, 498 U.S. 1018 (1990) (mem.); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) (deciding that although "[s]everal other circuits . . . have come to differing conclusions," it would adopt yet a fourth alternative); *Bergman*, 860 F.2d at 565-66 (confirming the existence of the four-way split); *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 39 (4th Cir. 1993) (acknowledging three-way split); *Road Sprinkler*

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[2] One of the earliest cases deciding the appealability of a single final judgment in consolidated cases was *Firestone Tire & Rubber Co. v. General Tire & Rubber Co.*, 431 F.2d 1199 (6th Cir. 1970). The split began to emerge one year later in *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971). Within fourteen years the courts had split in three different directions. *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984) (acknowledging three-way split). It took only four more years for the issue to receive its fourth unique answer. *See Bergman v. City of Atlantic City*, 860 F.2d 560, 565-66 (3d Cir. 1988) (recognizing existence of four-way split).

Fitters Local Union v. Cont'l Sprinkler Co., 967 F.2d 145, 148 (5th Cir. 1992) (remarking that a "divergence of opinion exists"); *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013) (recounting three-way split); *Sandwiches, Inc. v. Wendy's Intern., Inc.*, 822 F.2d 707, 710 (7th Cir. 1987) (same); *McCuen v. Am. Cas. Co. of Reading, Pennsylvania*, 946 F.2d 1401, 1410 (8th Cir. 1991) (dissenting opinion describing four-way split); *Huene*, 743 F.2d at 704 (acknowledging three-way split); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) ("enunciat[ing] here a new rule for this circuit, in the context of differing rules in other circuits"); *cert. denied*, 487 U.S. 1223 (1988); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003) (noting that the issue "has divided the courts of appeals"); *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1380 (Fed. Cir. 1996) (observing that "[o]ur sister circuits have answered this fundamental question in three different ways").

A journey through the circuits demonstrates how the circuit split renders appellate jurisdiction over a final judgment dependant upon the luck of geography. The First and Sixth Circuits would take jurisdiction over Petitioner's appeal. They apply a bright line rule—the dismissal of one of several consolidated cases is immediately appealable as of right. *See FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378 (1st Cir. 1988) (ruling that consolidated "cases retain their separate identity and judgments rendered in each individual action are appealable as final judgments"); *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir.

1994) (holding that a case disposed of on summary judgment "is appealable pursuant to 28 U.S.C. § 1291 despite the fact that the case with which it is consolidated has not been disposed").

A bright line rule is also applied in the Federal, Ninth, and Tenth Circuits. But, it is the *exact opposite* bright line rule—the dismissal of one of several consolidated cases is not immediately appealable as of right. Thus, in those circuits, the courts of appeal would refuse to accept jurisdiction over the exact same appeal presented to the First and Sixth Circuits. *See Spraytex*, 96 F.3d at 1381 (ruling that "there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case"); *Trinity*, 827 F.2d at 675 (adopting "the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291"); *Huene*, 743 F.2d at 705 (holding that "the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions").

The Second Circuit would also decline jurisdiction over Petitioner's appeal; but it would do so based upon a bright-but-fuzzy line rule—there is a near-*per se* presumption that the judgment is not appealable. *Hageman*, 851 F.2d at 71. This presumption may only be overcome in highly unusual circumstances. *Id.* The *Hageman* court deliberately did not adopt a bright line rule; because, it thought it better to "preserv[e] some flexibility," in the light of "the infinite array of consolidated actions that can arise." *Id.* However, the result is that an appellant who assumes that the *per se*

presumption is not overcome and delays filing the notice of appeal until all of the consolidated cases are final risks learning—too late—that the appeal is untimely when the Second Circuit concludes that "unusual circumstances" rendered the judgment final when it was first entered.

The fourth interpretation of "final judgment" was applied in this case. After a two year delay, briefing on the merits, and oral argument, the Third Circuit refused to accept jurisdiction over Petitioner's appeal. Presumably, Petitioner would have suffered a similar fate in the D.C., Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits. But, a litigant cannot be certain whether any of these courts will accept jurisdiction because they eschew a bright line in favor of a fuzzy line approach—if a case is consolidated "for all purposes" then there is a presumption against allowing an appeal of right; if not consolidated for all purposes, the courts apply a case-by-case approach that will likely permit an appeal. *See Hampton*, 318 F.3d at 216 (if actions were not consolidated "for all purposes," an order dismissing one action was an appealable final judgment") *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991) (the "dispositive" factor is "whether the cases were consolidated for trial or simply for pre-trial administration"); *Watson v. Adams*, No. 15-1706, slip op. at 4-5 (4th Cir. Mar. 25, 2016) (applying the case-by-case approach); *Road Sprinkler Fitters Local*, 967 F.2d at 149 (stating that an appeal is barred only where "consolidation of causes that could have been filed as a single suit existed, and the consolidation was clearly for all purposes" (citation omitted)); *Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992)

(opining that if "it is clear that cases have been consolidated only for limited purposes, a decision disposing of all the claims in only one of the cases is a final decision subject to immediate appeal"); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711-12 (8th Cir. 1996) (applying a similar rule);*Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013) (allowing an immediate appeal when "the district court did not consolidate the cases 'for all purposes'; rather, the cases were consolidated for pre-trial and discovery purposes").

Gelboim left the question—and the split— open in appeals involving Fed. R. Civ. P. 42. *See Gelboim*, 135 S.Ct. at 904, n.4. But, one concern it noted, "leav[ing] [litigants] in a quandary about the proper timing of their appeals," offered the courts of appeals a reason to reconsider their interpretations of "final judgment" in the context of consolidated cases and perhaps an opportunity to self-correct the circuit split. To date, the courts have not availed themselves of that opportunity. In *McCullough v. World Wrestling Entm't, Inc.*, Nos. 16-1231 and 16-1237, Slip Op. at 9 (2d Cir. Sept. 27, 2016), the Second Circuit declined to revisit its bright-but-fuzzy line rule. The opinion below similarly offered the Third Circuit the opportunity to reevaluate its fuzzy line rule; instead, the court declined to extend *Gelboim* to cases consolidated for all purposes. *Hall v. Hall*, Case No. 15-1564, Slip Op. at 7 n.9 (3d Cir. Feb. 10, 2017).

Regrettably, the split continues.

B. It is important that this Court establish a uniform—and manageable—rule clearly identifying when appellate jurisdiction attaches.

"The time of appealability, having jurisdictional consequences, should above all be clear." *Budinich*, 486 U.S. at 202. The importance of a uniform rule for the application of 28 U.S.C. § 1291 is well-established:

> [W]hat is of importance here is . . . preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule . . . .

Budinich, 486 U.S. at 202 (1988) (establishing uniform rule that a pending motion for an award of attorney's fees does not prevent a judgment on the merits from being final for purposes of § 1291).

The lack of a clearly articulated rule for an appeal from a final judgment in a consolidated case is untenable. There is no certainty "about the event that triggers the 30-day period for taking an appeal." *Gelboim*, 135 S.Ct. at 900. In the circuits where jurisdiction in such cases is decided on a case-by-case basis, a party with a final judgment *must* file a protective appeal; it cannot afford to await resolution of all consolidated cases before appealing; because, the circuit might then declare, "Sorry, this was one of the cases that should have been filed when the final judgment was entered in the specific proceeding."

In *Gelboim*, as in *Budinich*, this Court vindicated the importance of uniformity and bright line rules that give parties clear notice of the event that triggers the

"appeal-clock." That clarity is likewise needed in the context of appeals involving Fed. R. Civ. P. 42.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit, resolve the four-way split in the circuits, and reverse and remand for further proceedings.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1564

ELSA HALL, As Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,
Appellant

v.

SAMUEL HALL; HALL & GRIFFITH, PC

On Appeal from the District Court
of the Virgin Islands
(D.C. Nos. 3-11-cv-00054 and 3-13-cv-00095)
District Judge: Hon. Curtis V. Gomez

Argued
December 12, 2016

Before: CHAGARES, JORDAN and HARDIMAN,
Circuit Judges.
(Filed: February 10, 2017)

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OPINION*

JORDAN, *Circuit Judge.*

We are asked to intercede in a feud over the inevitable - death and taxes. Ethlyn Hall, an elderly landowner in the Virgin Islands, filed suit against her son when she grew dissatisfied with his actions as her attorney. After Ethlyn passed away, one of her daughters, Elsa Hall, served as personal representative of the estate (the "Estate") and continued to press Ethlyn's claims against Samuel.

Samuel brought claims of his own against Elsa in a separate proceeding. He argued that Elsa had poisoned his relationship with his mother, which caused him serious emotional distress. The Estate's claims and Samuel's claims were consolidated and tried together. A jury rejected the Estate's claims and rendered a two million dollar verdict in Samuel's favor. The District Court entered separate judgments on both aspects of the jury's decision.

Not surprisingly, the Estate has appealed the

* This disposition is not an opinion of the full court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

judgment with respect to its claims. It did not, however, appeal the judgment in favor of Samuel because the District Court granted a post-trial motion vacating the jury verdict. Samuel's claims are still awaiting retrial. He therefore argues that we do not have jurisdiction over this appeal while his claims are still pending in the District Court. We agree and will dismiss the appeal.

I. BACKGROUND[1]

Ethlyn Hall had once been close to her son Samuel, and he had provided many hours of free legal work for her. The two had a falling-out, however, over his efforts to develop one of the parcels of land that she owned on St. John. Ethlyn claimed that Samuel had taken advantage of her trust and the power of attorney she had granted him when he renegotiated a lease and received a large cash payment in connection with the construction of a home she had allegedly agreed to fund for him.

After learning of that transaction, and the associated tax consequences, Ethlyn cut off contact with her son. As her health deteriorated, she moved to Florida to live with Elsa. She altered her trust to designate Elsa as the sole successor trustee and two of her grandchildren as the sole beneficiaries. Ethlyn then filed suit against Samuel, in both her individual

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[1] The facts in this case are hotly contested and complex. Because we conclude that we lack jurisdiction, we focus on the procedural history necessary for understanding that conclusion and only touch on the underlying facts as needed for clarity.

capacity and as trustee of her inter vivos trust.[2]

Ethlyn's claims were in suspense for some time pending the resolution of an ultimately unsuccessful motion to dismiss in the District Court. Before that motion was resolved, Ethlyn died and Elsa took over as the personal representative of the Estate and the trust's sole trustee. Samuel then filed a separate suit against her in her individual capacity. He argued that she had harmed him by turning his mother against him, surreptitiously taking Ethlyn away from the Virgin Islands without informing other family members, and keeping her hidden from loved ones until her death.[3]

Samuel's claims against Elsa were consolidated for all purposes with the Estate's claims against him.[4] The

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[2] The Amended Complaint alleged that Samuel had 1) breached his fiduciary duties as Ethlyn's attorney; 2) breached his fiduciary duties by abusing his power of attorney; 3) committed legal malpractice; 4) improperly converted Ethlyn's property for his own benefit; 5) refused to return to Ethlyn her legal files (conversion); 6) committed fraud by deceiving Ethlyn about the lease renegotiation; and 7) been unjustly enriched through the proceeds of the lease renegotiation. Ethlyn also demanded an accounting, a constructive trust, and an equitable lien on Samuel's property.

[3] His legal claims included intentional infliction of emotional distress, undue influence, breach of fiduciary duty, fraud, tortious interference, and conversion.

[4] When the cases were first consolidated, Samuel had counterclaims and third party claims in the Estate's suit that substantially overlapped with the claims in his separate proceeding against Elsa. Those claims were dismissed before the

Estate moved to sever, arguing that consolidation would confuse the jury and be prejudicial to the Estate,[5] but the District Court did not respond to the motion to sever or explain its decision to try the claims together.

Most of the claims brought by both parties were dismissed before trial on a variety of grounds. As a result, the only claims that went to the jury were the Estate's fraud, unjust enrichment, and breach of fiduciary duty claims, and Samuel's intentional infliction of emotional distress claim. The jury rejected all of the Estate's claims. It also found Elsa liable for intentional infliction of emotional distress and awarded Samuel $500,000 in compensatory damages and $1,500,000 in punitive damages. The District Court entered separate judgments on the two sets of claims, and the Estate immediately filed this appeal concerning its claims against Samuel.

With regard to Samuel's claims, Elsa filed a motion for a directed verdict or, in the alternative, a new trial. The Court concluded that the jury might have relied on a legally untenable basis for finding intentional infliction of emotional distress, so it ordered a new trial. Samuel filed a motion for reconsideration, which remains pending. He asked the District Court to either allow for additional arguments or to certify the

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case went before the jury.

[5] Samuel opposed the motion to sever by pointing out that the claims had been consolidated for over a year without complaint and arguing that there were common witnesses and issues.

determinative legal question to the Virgin Islands Supreme Court.

We stayed review of the Estate's appeal pending the resolution of Elsa's post-trial motions. That stay was automatically lifted once the District Court ordered a new trial, and we declined to further stay the appeal pending the resolution of Samuel's motion for reconsideration.

II. JURISDICTION[6]

Samuel has filed a motion to dismiss this appeal on jurisdictional grounds.[7] He claims that we lack jurisdiction since there are outstanding motions before the District Court concerning his claims against Elsa. The Estate responds that, because the District Court entered separate final judgments, the two cases should no longer be seen as consolidated for purposes of appeal. We think Samuel has the better of this particular argument.

The case is in an unusual procedural posture. The Clerk of the District Court entered what is styled as a final judgment with regard to the Estate's claims, and ordinarily such a judgment would, of course, be

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[6] The District Court had diversity jurisdiction under 28 U.S.C. § 1332. For the reasons set forth herein, we lack jurisdiction.

[7] Samuel also filed a motion to strike the Estate's brief and appendix. Because we are dismissing for lack of jurisdiction, we do not consider that motion.

appealable.[8] The problem is that Samuel's claims against Elsa remain outstanding, and the District Court never entered an order severing the cases, nor did the Estate obtain a Rule 54(b) certification and determination that there was no just reason for delay. *See Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 229 (3d Cir. 2012) (discussing the requirements for Rule 54(b) certification).

When two cases have been consolidated for all purposes, a final decision on one set of claims is generally not appealable while the second set remains pending. *Bergman v. City of Atl. City*, 860 F.2d 560, 563 (3d Cir. 1988); *see also Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 476 (3d Cir. 2006) (noting that appeal is generally not available from an order terminating fewer than all claims against all parties). However, we do not employ a bright line rule and instead consider on a case-by-case basis whether a less-than-complete judgment is appealable. *Bergman*, 860 F.2d at 566. To make that determination, we consider "the overlap among the claims, the relationship of the various parties, and the likelihood of the claims being tried together." *United States. v. $8,221,877.16 in U.S. Currency*, 330 F.3d 141, 146 (3d.

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[8] The only pending motion involving the Estate's claim concerns attorney's fees, and that would not typically bar us from hearing an appeal, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), nor would the fact that the District Court did not issue an explanation for some of its rulings. See 3d Cir. L.A.R. 3.1 (2011) (allowing, but not requiring, the trial judge to provide a written opinion or amplification up to 30 days after the docketing of a notice of appeal).

Cir. 2003); *see also Bergman*, 860 F.2d at 566; *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991). Considering those factors, as well as the underlying question of whether "justice would be best served and judicial economy not compromised if separate appeals were permitted," *Bergman*, 860 F.2d at 566, we conclude that the Estate's appeal is not properly before us at this time.

Both parties' claims have already been heard together. Our cases allowing for separate appeals have typically involved claims that either were not consolidated for trial, *Hall*, 926 F.2d at 314; *Bogosian v Gulf Oil Corp.*, 561 F.2d 434, 441 (3d Cir. 1977), or had been consolidated for trial but had not yet been tried. *Bergman*, 860 F.2d at 566; *$8,221,877.16 in U.S. Currency*, 330 F.3d at 146. By contrast, here, all of the claims were in fact scheduled together and tried before a single jury. That counsels in favor of keeping the claims together on appeal.[9]

Moreover, the trial record illustrates some overlap of evidence among the claims. Witnesses such as Samuel and Elsa would inevitably testify in a suit involving either set of claims, and both sets of claims may turn on how Ethlyn reacted to learning about Samuel's lease renegotiation and who or what was influencing her thinking at the time. Considering that

---

[9] The Estate wants us to analogize to a recent Supreme Court decision affirming the appealability of final judgment in a case that was part of a multi-district litigation. *Gelboim v. Bank of Am. Corp.*, __ U.S. __, 135 S. Ct. 897, 905-06 (2015). But *Gelboim* is inapplicable because, with an MDL, consolidation is only for pretrial matters. 28 U.S.C. § 1407.

the District Court decided that justice and judicial economy were best served by consolidation in the first place, we will not second guess that judgment now by allowing piecemeal appeals.[10] There will also likely be overlapping issues on appeal once Samuel's claims become appealable, so waiting seems the better course.[11]

III. CONCLUSION

For the foregoing reasons, we will dismiss the Estate's appeal for lack of jurisdiction.

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[10] Because we lack jurisdiction, we do not consider the Estate's claim that due to the consolidation, it was prejudiced in presenting its case to the jury. Our opinion here does not foreclose a subsequent challenge on that point.

[11] In addition, we note that the Estate could have sought Rule 54(b) certification and yet chose not to do so. Indeed, at oral argument, the Estate's counsel conceded that nothing prevented him from seeking a Rule 54(b) motion even as the appeal was pending before us. The Rules of Civil Procedure provide that mechanism to certify appeals when finality is either lacking or in doubt.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1564

ELSA HALL, As Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,
Appellant

v.

SAMUEL HALL; HALL & GRIFFITH, PC

On Appeal from the District Court of the Virgin Islands
(D.C. Nos. 3-11-cv-00054 and 3-13-cv-00095)
District Judge: Hon. Curtis V. Gomez

Argued
December 12, 2016

Before: CHAGARES, JORDAN and HARDIMAN,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Virgin Islands and was argued on December 12, 2016.

On consideration whereof, it is now ORDERED and

ADJUDGED by this Court that Elsa Hall's appeal is dismissed for jack of jurisdiction. All of the above in accordance with the opinion of this Court. The parties are to bear their own costs.

ATTESTED:

s/ Marcia M. Waldron
Clerk

Date: February 10, 2017

UNITED STATES DISTRICT COURT
for the District of the Virgin Islands

ELSA HALL, in her representative capacity *Plaintiff*	)	
v.	)	Civil Action No. 3:11-cv-00054
SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C., *Defendant*	)	

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($_____) which includes prejudgment interest at the rate of ___ plus post judgment interest at the rate of ___% per annum, along with costs.

☑ the plaintiff recover nothing, the action be dismissed on the merits.

☐ other: _____

This action was *(check one)*:

☑ tried by a jury with Judge Curtis V. Gómez, District Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for _____.

Date: February 4, 2015

GLENDA LAKE, ESQUIRE
CLERK OF COURT

/s
signature of Clerk or Deputy Clerk

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

SAMUEL H. HALL, JR., Plaintiff, v. ELSA HALL, Defendant.	Civil No. 2013-95
ELSA HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHLYN LOUISE HALL, AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST, Plaintiff, v. SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C., Defendants.	Civil No. 2011-54

ORDER

Before the Court is plaintiff Samuel Hall's motion to consolidate this matter with Civil Number 11-54, captioned *Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust v. Samuel H. Hall, Jr., et al.* [DE 11]. Defendant opposes the motion. [DE 15]. The premises considered, it is hereby ORDERED:

1. The motion to consolidate is GRANTED.
2. The following cases shall be consolidated: 3:11-cv-54 and 3:13-cv-95.
3. All submissions in the consolidated case shall be filed in case number 3:11-cv-54.

Dated: February 14, 2014

S_____

RUTH MILLER
United States Magistrate Judge

RECORD AND BRIEFS

No. 16-1150

FILED
JUN 14 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ELSA HALL, As personal representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. and HALL & GRIFFITH, P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit Court of Appeals determined that the case before it is not separately appealable absent certification under Federal Rule of Civil Procedure 54(b) because it had been consolidated for trial and pre-trial administration with a related case. The question presented by the petition is:

> Should the Court grant certiorari to consider, absent certification pursuant to Federal Rule of Civil Procedure 54(b), whether cases scheduled and tried together should be appealable separately?

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held corporation owning 10% or more of the stock of Respondent, Hall & Griffith, P.C. which is a professional corporation

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RULE

Fed. R. Civ. P. 54(b) ..... *passim*

S. Ct. Rule 10 4

RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Petitioner raises a question about the right of a party to appeal one of two separate but related cases in a consolidated case that has been consolidated for all purposes, including trial. Even if the question Petitioner raises were properly presented, there is no important conflict among the circuit courts of appeals. Further, even if there were, Rule 54(b) provides an adequate remedy.

STATEMENT OF THE CASE

In April 2011, Samuel H. Hall, Jr. ("Samuel") along with his niece, Yassin Hall ("Yassin"), sought the appointment of a guardian for his mentally and physically declining 94-year-old mother ("Mrs. Hall"). In avoidance of this, his sister, Elsa Hall ("Elsa") took his mother from the Virgin Islands to an undisclosed location in Florida to live, all without Samuel's and Yassin's knowledge. Elsa also procured a lawyer to file suit against her brother as she sought to exploit her mother's retirement income and assets. On May 9, 2011, the lawyer Elsa procured filed suit on behalf of Mrs. Hall against her son, Samuel and his law firm, Hall and Griffith, P.C. (collectively "Respondents"), for breach of fiduciary duty, conversion, malpractice, and fraud. The focus of the lawsuit was to hold Respondents liable for an amount equal to the gifts Mrs.

Hall memorialized in writing that she had given between 2003 to 2007 to Samuel and his sister Phyllis and Mrs. Hall's granddaughter, Yassin, but not to Elsa, in order to assist them with the construction of homes on property Mrs. Hall gifted to them in 2002.

While Samuel and Yassin prosecuted the guardianship action in the Virgin Islands Superior Court over the opposition of Elsa, Mrs. Hall died. Elsa was appointed the administrator of Mrs. Hall's estate and became the sole trustee of her trust. As such, Elsa amended the complaint filed in Civil No. 11-54 ("11-54") and Respondents answered the amended complaint. Samuel also asserted a counterclaim against Elsa in both her individual and representative capacities. He also sued Elsa in a separate action in her individual capacity in (Case No. 3:13-cv-95) ("13-95"). That lawsuit made essentially the same allegations against Elsa in her individual capacity that Samuel made against her in both her representative and individual capacities in the counterclaim in 11-54. Samuel then moved, in both actions, to consolidate the two cases.

On February 14, 2014, the district court consolidated both actions for all purposes. The consolidation orders did not limit consolidation to pre-trial administration. The two cases were then tried together despite a motion to sever the cases filed on the eve of trial by Petitioner. Throughout the litigation, including the trial, separate counsel represented Elsa in her two separate capacities.

Prior to the start of the consolidated trial, and during the trial, the district court rejected substantial portions of Petitioner's claims and substantial portions of Samuel's claims. The jury returned a verdict in favor of Respondents, finding no liability on their part, and against Elsa in her representative capacity. The jury also returned a verdict in favor of Samuel and against Elsa in her individual capacity, awarding Samuel $500,000 in compensatory damages and $1.5 million in punitive damages.

On February 4, 2015, the district court clerk entered separate judgments in each separate case. However, on March 4, 2015, Elsa filed a motion for a new trial in the case against her in 13-95. Also, on March 5, 2015, Elsa in her representative capacities filed an appeal in the Third Circuit in Civil No. 11-54 even though the district court did not enter an order separating 11-54 from the consolidated case and Petitioner did not seek Federal Rule of Civil Procedure 54(b) ("Rule 54(b)") certification and a determination that there was no just cause for delay.

Respondents moved to dismiss the appeal, asserting that the judgment entered in 11-54 was not final because there was not yet a final ruling in 13-95. On March 30, 2016, the district court granted the motion for new trial in 13-95 and vacated the verdict against Elsa individually.

The Third Circuit asked the parties to brief the issue of jurisdiction in their appellate briefs. The issue was briefed and after oral argument on December 12,

2016, the Third Circuit issued an opinion determining it lacked jurisdiction over 11-54. On February 10, 2017, the Third Circuit dismissed Petitioner's appeal for lack of appellate jurisdiction. Thereafter, on April 4, 2017, Civil No. 13-95 was retried in the lower court. On April 6, 2017, the jury returned a verdict in favor of Samuel and against Elsa in the amount of $3,384,000 in compensatory damages and $6,618,000 in punitive damages.

A motion for a directed verdict and for a mistrial are pending in the case.

REASONS FOR DENYING THE WRIT

The Third Circuit Court of Appeals determined that Civil No. 11-54 is not separately appealable absent certification under Rule 54(b) because it had been consolidated for trial and pre-trial administration with a related case. There does not appear to be an important split among the federal circuit courts regarding whether cases scheduled and tried together may be appealed separately. None of the cases cited by Petitioner indicate an important split among the circuits within S. Ct. Rule 10. Second, Petitioner seeks to occupy this Court with an issue that is addressable consistently in all circuits by the application of Rule 54(b). There does not appear to be any split among the circuits regarding the effect of such a certification where there is no just cause for delay.

I. There Is Unanimity Among The Circuits Regarding The Lack Of Jurisdiction Over A Separate Appeal Of A Case Consolidated, Scheduled And Tried Together With Another

This case involves the narrow situation where two related cases were consolidated for all purposes, that is, for case management and for trial, and Petitioner sought a separate appeal of one of the individual cases. While Petitioner has cited to precedent in various circuits seeking review by this Court, the cases cited by Petitioner do not indicate a split among the circuits regarding the jurisdictional prerequisite of an appeal of an individual case that was part of a consolidated case where the individual cases that were consolidated were scheduled and tried together.

First and Sixth Circuits

The First and Sixth Circuit cases cited by Petitioner, *FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378 (1st Cir. 1988) and *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994) do not address the issue of the appealability of an individual case that was consolidated and then scheduled and tried together before a single jury to final judgment with another case. Rather, those cases involve consolidated cases where an appeal was allowed of an individual case where summary judgment has been granted in one of them. That is not this case. Thus, there is no indication in the First

and Sixth Circuit cases cited by Petitioner that the instant case would have been decided differently in those circuits than it was by the Third Circuit.[1]

Federal, Ninth, and Tenth Circuits

Petitioner concedes that the Federal, Ninth, and Tenth Circuits would rule on appeal the same way in connection with the instant case as the Third Circuit did and hold that "the dismissal of one of several consolidated cases is not immediately appealable as of right." *Petitioner's Brief at 7.* As Petitioner concedes those circuits would refuse to accept jurisdiction:

> *See Spraytex*, 96 F.3d at 1381 (ruling that "there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case"); *Trinity*, 827 F.2d at 675 (adopting "the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291"); *Huene*, 743 F.2d at 705 (holding that "the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions"). *Petitioner's Brief at 7.*

Thus, there is no split among those circuits and the Third Circuit.

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[1] The two circuits alternatively could have deemed consolidated cases involving summary judgment of one of the separate cases as Rule 54(b) compliant and achieved the same result. In essence the two circuits treat a final judgment by summary judgment as akin to Rule 54(b) certification.

Second Circuit

Petitioner also acknowledges that "The Second Circuit would also decline jurisdiction over Petitioner's appeal" *Petitioner's Brief at 7.* Petitioner just does not like the way the Second Circuit expresses its decision. However, the fact that the Second Circuit reaches the same result as other circuits via a different rationale does not constitute or create a split among the circuits. Circuits are not split where they have different verbal formulations of the same underlying legal rule.

Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits

The Third Circuit held in the instant case, citing *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991) that it lacked jurisdiction to decide on appeal Petitioner's individual case because the "dispositive" factor is "whether the cases were consolidated for trial or simply for pretrial administration." The instant case was consolidated for both. Petitioner virtually concedes that the Petitioner's appeal "would have suffered a similar fate in the D.C., Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits" as it did in the Third Circuit. *Petitioner's Brief at 8.* Thus, in no instance has the Petitioner identified a case in which an appeal was allowed of an individual case, absent Rule 54(b) certification, where it had been consolidated with another case for all purposes. The conclusion is inescapable that there is no split among the circuits concerning whether they have

jurisdiction over the appeal of an individual case that was consolidated for all purposes with another.

II. There Is Unanimity Among All Circuit Courts That Rule 54(b) Certification Satisfies The Jurisdictional Prerequisite For Appeal

Petitioner seeks to occupy this Court with an issue that is addressable consistently and tolerably in all circuits by the application of Rule 54(b). National uniformity among the circuits concerning the appeal of an individual case constituting part of a consolidated case is not essential where Rule 54(b) provides a national remedy that addresses the issue about which Petitioner complains.

After the jury verdict in the instant consolidated case, Petitioner never sought Rule 54(b) certification of Petitioner's individual action despite the eventual passage of two years since the jury verdict was rendered and judgment entered thereon. Rule 54(b) is interpreted in all circuit courts of appeals as allowing for an appeal of an individual case where there was no just reason for delay. See, e.g., *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 229 (3d Cir. 2012). Not only was Rule 54(b) certification not sought by Petitioner at the outset of this case, no supplemental order that otherwise satisfies this jurisdictional prerequisite was ever obtained. Had 54(b) certification been obtained, an appeal would have been allowed in all of the circuit courts of appeals. As far as Respondent is able to determine, there is no split among the circuits in interpreting

whether they have jurisdiction over a case that has been certified for appeal by a lower court.

Petitioner's failure to invoke 54(b) was noted pointedly by the Third Circuit in determining it had no jurisdiction to hear the appeal of Petitioner. Its ruling was also consistent with Third Circuit precedent that, absent 54(b) certification, cases scheduled and tried together remain consolidated on appeal. Said the Third Circuit in *Hall v. Wilkerson*, 926 F.2d at 314:

> Among the criteria we considered in deciding whether the orders in *Bergman* and *Bogosian* were appealable were whether the cases were in the same forum with the same judge; whether the complaints and defendants were identical; whether plaintiffs had the same counsel in both actions; and, as noted, whether the cases were consolidated for trial or simply for pre-trial administration. Both *Bogosian* and *Bergman* found the latter consideration dispositive. In *Bogosian*, we emphasized that the two cases had not been consolidated for trial, whereas in *Bergman*, they were. Moreover, in *Bergman* both the complaints were "substantially similar" in the two actions.

Similarly, in connection with the instant case, the Third Circuit noted:

> Both parties' claims have already been heard together. Our cases allowing for separate appeals have typically involved claims that either were not consolidated for trial, *Hall*, 926 F.2d at 314; *Bogosian v. Gulf Oil Corp.*, 561

> F.2d 434, 441 (3d Cir. 1977), or had been consolidated for trial but had not yet been tried. *Bergman*, 860 F.2d at 566; *$8,221,877.16 in U.S. Currency*, 330 F.3d at 146. By contrast, here, all of the claims were in fact scheduled together and tried before a single jury. That counsels in favor of keeping the claims together on appeal.

Hall v. Hall, Case No. 15-1564, Slip Op. at 8 (3d Cir. Feb. 10, 2017).

Petitioner laments the fact that "After a two-year delay, briefing on the merits, and oral argument, the Third Circuit refused to accept jurisdiction over Petitioner's appeal." *Petitioner's Brief at 8.* But after the jury verdict and final judgment, Petitioner never sought an order severing the cases, nor sought Rule 54(b) certification and a determination that there was no just reason for delay. *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 229 (3d Cir. 2012). The fault then lies not in the circuits but with Petitioner. Whether Petitioner will continue to wait on a final order in 13-95 or decide to seek Rule 54(b) certification of an individual case remains to be seen.

CONCLUSION

Petitioner has presented no evidence of conflict among the circuits concerning appellate jurisdiction over cases consolidated for all purposes including trial before a single jury. Nor is there evidence of any conflict among the circuits regarding the opportunity for

appellate jurisdiction where there is Rule 54(b) certification. The petition for certiorari should be denied.

DATED: June 14, 2017

Respectfully submitted,

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Supreme Court, U.S.
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No. 16-1150

In The
Supreme Court of the United States

ELSA HALL,
as personal representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ADDENDUM TO STATEMENT OF THE CASE

After the Petition for Writ of Certiorari was filed a new trial of the case that was consolidated with this case was held on April 4, 2017. At the conclusion of Samuel Hall's case, Elsa Hall ("Elsa") in her individual capacity moved for a judgment as a matter of law under Fed. R. Civ. P. 50(a) and for a mistrial. The trial court took those motions under advisement, at which point Elsa rested without calling any witnesses. The jury returned a verdict against Elsa in her individual capacity. The trial court has neither ruled on those motions nor entered judgment on the jury verdict. If the motions are denied, Elsa will renew the motion for judgment as a matter of law in accordance with Fed. R. Civ. P. 50(b) after the judgment is entered.

REPLY BRIEF FOR THE PETITIONER

Petitioner was denied the *right* to appeal from a final judgment provided by 28 U.S.C. § 1291. The circuits are split in four different ways as to whether a party with a final judgment in a case has such a *right* if the case is consolidated with other cases that are not yet final. How does one oppose a petition for certiorari when the Question Presented reflects a four-way split in the circuits (that eleven of the twelve circuits have expressly recognized) and is of such importance that this Court has twice granted certiorari to answer it?

Respondents' strategy is to use the Fallacy of Distraction. They reframe the issue with a Question *Not* Presented and assert that because Petitioner *might* be able to persuade a district court to allow a *discretionary* appeal under Fed. R. Civ. P. 54(b), it

follows that the denial of the *right* to appeal is of no importance. Simply stating that proposition refutes it.

In arguing that the Question Presented is not important, Respondents' tellingly omit any mention of *Gelboim v. Bank of America Corp.*, 135 S.Ct. 897 (2015). In *Gelboim*, this Court deemed the same Question Presented (the real Question Presented, not the Respondent's reframed version) important enough to grant certiorari. Although the Court narrowed the question when it answered it (thereby leaving the question unresolved for cases—such as this one—that are consolidated under Fed R. Civ. P. 42[1]), the same concerns undergird the Question Presented in this case that the Court considered so important in *Gelboim*: To end the circuit split that creates a "quandary about the event that triggers the 30–day period for taking an appeal." 135 S.Ct. at 900.

Respondents' Brief in Opposition is also notable for its failure to acknowledge that *Gelboim* rejected (in the context of cases consolidated in a multi-district litigation proceeding) their argument; yet, Respondents offer no any reason why the outcome should be different here. In *Gelboim*, the respondent banks likewise argued "the sole avenue for appeal while the consolidation continues is Rule 54(b)." 135 S.Ct. at 904. This Court rebuffed that argument, largely because: (a) it is important that practitioners have a bright line establishing the date a notice of appeal must be filed; and (b) Fed. R. App. 4(a)(1)(A) specifies that a notice of appeal must be filed within thirty days "after entry of

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[1] *See Gelboim*, 135 S.Ct. at 904, n.4.

the judgment or order *appealed from*" (rather than the judgment or order ultimately entered in the consolidated case that is not the basis for the appeal) (emphasis added). (The appealing party has no standing to appeal from the judgment in the other case and that judgment might not have any relevance to the party's appeal[2]).

A. Importance of the Question Presented

A sampling of cases highlights the quandary identified by this Court in *Gelboim*. Consider the dilemma presented by the Second Circuit's version of the circuit split, where an appeal of a final judgment in one case consolidated with another non-final case is not permitted except in "highly unusual" circumstances. A litigant must either be able to predict with 20-20 foresight whether a highly unusual circumstance exists or file a protective appeal. That foresight requires being able to ascertain whether the circuit believes "the district court clearly intended final judgment to be

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[2] The difference in the consolidated cases in this appeal demonstrates that concept perfectly. Here, Elsa in her representative capacity presented three issues on appeal: whether certain claims survived her mother's death; whether the trial court erred when it held that a party cannot recover damages for the penalties and interest it legally must pay to the IRS due to another party's negligence unless the IRS has begun enforcement proceedings against the party; and whether it was error to refuse to sever the cases for trial. None of the issues in the case against Elsa in her individual capacity are related to survival of actions or taxes. And, Elsa in her individual capacity has now proceeded to a second trial and thus from her perspective in an individual capacity, any error from the failure to sever the first trial is moot while remaining a live controversy in this appeal.

entered," *Kamerman v. Steinberg*, 891 F.2d 424, 429–30 (2d Cir.1989), or that "'the case on appeal is the only one of the consolidated cases that presents' a certain type of claim." *Kelly v. City of N.Y.*, 391 F. App'x 69, 70 (2d Cir. 2010) (quoting *Kamerman*, 891 F.2d at 429-30).

If the litigant does not file a protective appeal, it can anticipate a jurisdictional challenge when it files its appeal after all consolidated cases are final. Sometimes, the appellant will get lucky and survive such a challenge. *See, e.g., Biocore, Inc. v. Khosrowshahi*, 80 Fed. App'x 619, 623-24 (10th Cir. 2003) (denying challenge to appellate jurisdiction where appellant did not appeal until all consolidated cases were final). Because the stakes–the risk of having an appeal dismissed as untimely–are so high, and because of the uncertainty as to which of the courts of appeals' four different solutions is the solution that this Court will ultimately deem to be the correct solution, a wise advocate will always file a protective appeal when a judgment is entered in a single case that is consolidated with other cases that remain pending.

The uncertainty leads to needless "protective" appeals. For example, in *United States v. Sunset Ditch Co.*, 472 Fed. App'x 472 (9th Cir. 2012), the trial court entered judgment in several consolidated cases but had not ruled in other consolidated cases. The appellant filed a "protective appeal" while simultaneously moving to dismiss its own appeal for lack of appellate jurisdiction (based upon the fact that not all of the consolidated actions had been decided). If there were a

bright line rule establishing the time when the appeal clock begins to tick for final judgments in a consolidated case, then all of these inefficient and cost-increasing procedures (jurisdictional challenges and protective appeals) would be unnecessary. The Petition presents the Court with an opportunity to end the circuit split; establish a clear rule as to when the time to appeal begins to run in consolidated cases; and eliminate needless and costly practices caused by the current uncertainty as to when a notice of appeal must be filed.

B. Rule 54(b) is inapplicable.

Respondent's argue that this Court should sidestep the Question Presented on the theory that Petitioner should seek a discretionary appeal through Rule 54(b) rather than availing herself of an appeal as of right. The argument fails because it misinterprets Rule 54(b).

1. Rule 54(b) does not apply when a case is completely dismissed.

Rule 54(b) applies to "an action" and authorizes a court to enter a final judgment "as to one or more, but fewer than all, claims or parties." As this Court has recognized, Rule 54(b) does not apply in those instances where a case is completely dismissed:

> If Mackey's complaint had contained only Count I, there is no doubt that a judgment striking out that count and thus dismissing, in its entirety, the claim there stated would be both a final and an appealable decision within the meaning of § 1291. Similarly, if his complaint had contained Counts I, II, III and IV, there is no doubt that a

> judgment striking out all four would be a final and appealable decision under § 1291.

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436 (1956).

Here, the district court entered a final judgment dismissing all of the counts of Petitioner's action. The final judgment ordered that Petitioner "recover nothing" and that "the action be dismissed on the merits." A-12[3] Petitioner's case was dismissed entirely. Just as in *Gelboim*, "Rule 54(b) is of no avail to" Petitioner. 135 S.Ct. at 900. Thus, the plain language of Rule 54(b) is inapplicable in the situation where a case has been completely dismissed.

2. Consolidated cases are not merged into a single action.

Respondents' only argument for asserting that Rule 54(b) is available to Petitioner is based upon an assumption (neither articulated nor argued by Respondents) that when cases are consolidated for trial under Fed. R. Civ. P. 42, they are merged and become a single action and therefore a dismissal in one such case is not final until final judgments are entered in all of the consolidated cases.[4]

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[3] The Judgment is reprinted at A-12 in the Petition for Certiorari.

[4] Ironically, part of the four-way split between the circuits is created by a two-way split between the circuits as to whether or not a Rule 42(a) consolidation merges the cases into one unit for purposes of appeal. The First and Sixth Circuits emphatically hold that it does not. *See FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378

a. Historically, this Court recognized that consolidated cases were not merged.

Prior to the adoption of the Federal Rules of Civil Procedure, this Court rejected the proposition that consolidation of cases resulted in the merger of the actions. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." (footnote omitted)). *See also Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 293 (1892) ("[A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments . . . ."). Consistent with the rule that cases were not merged through consolidation, prior to the adoption of the Federal Rules of Civil Procedure, this Court permitted appeals from final orders in individual cases that had been consolidated with other (non-final) cases. *See, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-14 (1926); *Withenbury v. United States*, 72 U.S. 819, 821-22 (1866).

Given the above precedents that existed at the time the Federal Rules of Civil Procedure were

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(1st Cir. 1988) (holding that consolidated cases retain their separate identity and that a final judgment entered in one case is immediately appealable under 28 U.S.C. § 1291) and *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994) (same).

promulgated, one would expect that if those rules were intended to overrule this Court's precedents (bearing in mind that it was the Court itself that promulgated the rules), the Advisory Committee that helped develop those rules would have called attention to the change. The Advisory Committee did exactly that with other rules changes that departed from the pre-Rules practice; but there is nary a hint in the Notes of the 1937 Advisory Committee suggesting any intent to depart from several precedents of this Court.[5]

b. Numerous and varied applications of the Federal Rules of Civil Procedure establish that Rule 42 does not result in the merger of actions.

The way in which the Federal Rules of Civil Procedure operate would change dramatically if Rule 42 merges cases that are consolidated. Questions about how Rule 42 affects other aspects of the rules arise frequently—and the courts, including this Court, consistently recognize that Rule 42 does not alter the status of an "action" and merge two actions into one

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[5] Even when the adoption of the new federal rules resulted in a minor change in existing practice, the Advisory Committee highlighted the change. *See, e.g.* Notes of the 1937 Advisory Committee to Rule 4(f) ("This rule enlarges to some extent the present rule . . ."). *See also* Notes of the 1937 Advisory Committee to Rule 18(a) (describing modern trends and indicating that the rule broad[ens] existing practice). And, when the new rules were departing from practices authorized by federal statute, the Advisory Committee did not hesitate to acknowledge the change: "These statutes are superseded insofar as they differ from this and subsequent rules." Notes of the 1937 Advisory Committee to Rule 26(a).

and thereby change the procedures applicable to the individual actions. Examples of this abound in the case law. For example:

- This Court requires that—despite consolidation of cases in the district court—"[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Butler v. Dexter*, 425 U.S. 262, 267, n.12 (1976); *accord*, *Cole v. Schenley Industries, Inc.*, C.A.2 (N.Y.) 1977, 563 F.2d 35, 38 (2d Cir. 1977).

- Improper service of a defendant in one case is not cured by consolidating that case with another case in which the same defendant was properly served. *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.).

- A plaintiff may dismiss "an action" without a court order by securing a stipulation of dismissal "signed by all parties who have appeared." Fed. R. Civ. P.41(a)(1)(A)(ii). The plaintiff does not need to secure the signatures of parties in all other actions subject to a consolidation order. *United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984).

- Consolidation does not merge cases and the cases retain their independent status such that the parties to one action can settle it independently of the other. *State Mutual Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979) (quoting *Johnson*).

C. Rule 54(b) is neither an adequate nor acceptable substitute for an appeal of right.

Any advocate familiar with discretionary review and review as of right appreciates that the former is a poor substitute for the latter. With an appeal of right, the door to the courthouse is wide open and welcoming. With a discretionary appeal, the appellant must first pry the door open. Rule 54(b) creates a discretionary appeal and was intended to keep the door firmly shut except to "afford a remedy in the infrequent harsh case." *Panichella v. Pennsylvania R. Co.*, 252 F.2d 452, 454–55 (3d Cir. 1958)."It follows that 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel." *Id.* at 454–55. *See also Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005) (holding Rule 54(b) certification was unwarranted and an abuse of discretion).

Thus, even if Rule 54(b) was potentially available in this case, Petitioner would still be better off with an appeal as of right. Petitioner's Question Presented is directed to that appeal as of right and Respondents' effort to hijack the Question Presented should be rejected.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit, resolve the four-way split in the circuits, and reverse and remand for further proceedings.

Respectfully submitted,

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No. 16-1150

In The
Supreme Court of the United States

ELSA HALL,
As Personal Representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed March 17, 2017
Certiorari granted September 28, 2017

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District Court of the Virgin Islands
District of the Virgin Islands (St. Thomas Division)

CIVIL DOCKET FOR CASE #:
3:11-cv-00054-CVG-RM
Hall et al v. Hall et al
Assigned to: District Judge Curtis V. Gomez
Date Filed: 05/09/2011
Date Terminated: 02/04/2015

and

CIVIL DOCKET FOR CASE #:
3:13-cv-00095-CVG-RM
Hall v. Hall
Assigned to: District Judge Curtis V. Gomez
Date Filed: 10/01/2013

Date Filed	-54 Dkt. #	-95 Dtk. #	Docket Text
05/09/2011	1		COMPLAINT against All Defendants (Filing fee $ 350.) filed by Ethlyn Louise Hall, Ethlyn Hall as trustee of the Ethlyn Louise Hall Family Trust. (Attachments: # 1 Exhibit A, 2007 power of attorney, # 2 Exhibit B, 2008 power of attorney, # 3 Exhibit C, 2003 ground lease, # 4 Exhibit D, August 3, 2007 letter, # 5 Exhibit E, Assignment, # 6 Exhibit F, Surrender of 2003 ground lease, # 7 Exhibit G, 2008 ground

		lease, # 8 Exhibit H, closing statement, # 9 Exhibit I, February 1, 2011 capital gains letter, # 10 Exhibit J, 1099-S for ground lease transaction, # 11 Civil Cover Sheet Civil cover sheet, # 12 Summons to Hall & Griffith, PC, # 13 Summons to Samuel H. Hall, Jr.) (Simpson, Andrew) (Main Document 1 replaced on 5/9/2011) (TRH). (Attachment 11 replaced on 5/9/2011) (TRH). (Entered: 05/09/2011)
01/21/2013	32	AMENDED COMPLAINT *filed as of right per Rule 15(a)(1)* against All Defendants filed by Ethlyn Louise Hall, Ethlyn Hall as trustee of the Ethlyn Louise Hall Family Trust. (Simpson, Andrew) (Entered: 01/21/2013)
02/28/2013	43	*Defendants* ANSWER to Complaint with Jury Demand, COUNTERCLAIM against Elsa Emily Hall by Samuel Hall, Hall and Griffth P.C. (Hall, Samuel) Modified on 2/28/2013 (TRH). (Entered: 02/28/2013)

04/10/2013	52		ANSWER to 43 *Counterclaim* by Counter Defendant Elsa Emily Hall. (Simpson, Andrew) (Entered: 04/10/2013)
10/01/2013		1	COMPLAINT against Elsa Emily Hall (Filing fee $ 400 receipt number 0391-462666.)filed by Samuel H Hall, Jr. (Thomas-Griffith, Marie) (Additional attachment(s) added on 10/1/2013 # 1 Civil Cover Sheet) (KAB). (Entered: 10/01/2013)
12/16/2013		8	AMENDED COMPLAINT against Elsa Emily Hall filed by Samuel H Hall, Jr. (Hall, Samuel) (Entered: 12/16/2013)
12/16/2013		11	MOTION to Consolidate Cases by Plaintiff Samuel H Hall, Jr. Motions referred to Magistrate Judge Ruth Miller. (Attachments: # 1 Exhibit A) (Hall, Samuel) (Entered: 12/16/2013)
01/09/2014		15	Opposition to Motion re 11 MOTION to Consolidate Cases filed by Defendant Elsa Emily Hall. (Beckstedt, Carl) (Entered: 01/09/2014)
01/25/2014		19	REPLY to Opposition to Motion re 15 Opposition to Motion, 11 MOTION to Consclidate Cases filed by

			Plaintiff Samuel H Hall, Jr. (Attachments: # 1 Exhibit Exhibit 1 – Excerpts from the November 26, 2013 Deposition of Elsa Hall) (Thomas-Griffith, Marie) (Entered: 01/25/2014)
02/14/2014	151	24	ORDER granting 11 Motion to Consolidate Cases 3:13-cv-95 and 3:11-cv-54. All submissions in the consolidated case shall be filed in case number 3:11-cv-54. (RM) (AO) (Entered: 02/14/2014)
03/17/2014	176	41	TRIAL MANAGEMENT ORDER (RM): Status Conference set for 7/8/2014 at 10:30 AM in Chambers before Magistrate Judge Ruth Miller., Final Pretrial Conference set for 1/13/2015 at 10:30 AM in STT Courtroom 2 before Magistrate Judge Ruth Miller., Trial set for 1/21/2015 at 09:30 AM in STT Courtroom 1 before District Judge Curtis V. Gomez.) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (AO) (Entered: 03/17/2014)

11/24/2014	290	151	AMENDED ORDER (RM): The trial of these consolidated matters is RESCHEDULED for January 12, 2015, at 9:00 a.m. before District Judge Curtis V. Gomez (Final Pretrial conference is rescheduled for January 6, 2015, at 11:00 a.m., before Magistrate Judge Ruth Miller; the parties shall file their joint final pretrial order no later than January 5, 2015; the parties shall file their proposed jury instructions, proposed voir dire, proposed verdict form and a trial brief or memorandum pursuant to Local Rule 16.1(c) no later than January 8, 2015.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (TRH) (Entered: 11/24/2014)
12/24/14	317	177	MOTION to Sever by Plaintiff Elsa Emily Hall. (Attachments: # 1 Exhibit 1, Order from Florida Court, # 2 Text of Proposed Order) Associated Cases: 3:11-cv-00054-CVG-RM,

			3:13-cv-00095-CVG-RM (Simpson, Andrew) (Entered: 12/24/2014)
01/05/2015	334	194	Opposition to Motion re (317 in 3:11-cv-00054-CVG-RM, 177 in 3:13-cv-00095-CVG-RM) MOTION to Sever filed by Defendants Samuel Hall, Hall and Griffith, PC, Counter Claimants Samuel Hall, Hall and Griffith, PC. (Attachments: # 1 2015 January 2 Notice of Appeal) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (Thomas-Griffith, Marie) (Entered: 01/05/2015)
01/06/2015	339	199	REPLY to Opposition to Motion re (334 in 3:11-cv-00054-CVG-RM, 194 in 3:13-cv-00095-CVG-RM) Opposition to Motion, filed by Plaintiff Elsa Emily Hall. (Attachments: # 1 Exhibit 1, Last Will of Ethlyn Hall (Florida), # 2 Exhibit 2, Amendment to Trust, # 3 Exhibit 3, email re improper attempt to assert third party complaint) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM

			(Simpson, Andrew) (Entered: 01/06/2015)
01/15/2015	416	277	JURY VERDICT in favor of defendant Samuel Hall Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (CAB) (Entered: 01/20/2015)
02/04/2015	420		CLERK'S JUDGMENT (KAB) (Entered: 02/04/2015)
02/04/2015		281	CLERK'S JUDGMENT in favor of Samuel H Hall, Jr against Elsa Emily Hall (KAB) (Entered: 02/04/2015)
03/04/2015		288	Amended MOTION for Judgment NOV by Defendant Elsa Emily Hall. (Attachments: # 1 Exhibit Memorandum in Support of Rule 50 Motion, # 2 Exhibit Exhibit A, # 3 Exhibit Exhibit B) (Bleecker, Michelle) (Entered: 03/04/2015)
03/04/2015		289	Amended MOTION for New Trial *in accordance with rule* 59 by Defendant Elsa Emily Hall. (Attachments: # 1 Exhibit Memorandum in Support of Rule

			59 Motion, # 2 Exhibit Exhibit A, # 3 Exhibit Exhibit B, # 4 Exhibit Exhibit C) (Bleecker, Michelle) (Entered: 03/04/2015)
03/05/2015	426		NOTICE OF APPEAL as to 420 Clerk's Judgment by Elsa Emily Hall. Filing fee $ 505, receipt number 0391-546663. (Simpson, Andrew) (Entered: 03/05/2015)
03/24/2015	435	296	Opposition to Motion re (286 in 3:13-cv-00095-CVG-RM) MOTION for Directed Verdict filed by Defendants Samuel Hall, Hall and Griffith, PC, Counter Claimants Samuel Hall, Hall and Griffith, PC. (Attachments: # 1 Trial Transcript Excerpt – January 12, 2015, # 2 Trial Transcript Excerpt – January 13, 2015, # 3 Trial Transcript Excerpt – January 14, 2015) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (Thomas-Griffith, Marie) (Entered: 03/24/2015)

03/31/2015	437	298	Opposition to Motion re (287 in 3:13-cv-00095-CVG-RM) MOTION for New Trial , (289 in 3:13-cv-00095-CVG-RM) Amended MOTION for New Trial *in accordance with rule* 59 filed by Plaintiff Samuel H Hall, Jr. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (Thomas-Griffith, Marie) (Entered: 03/31/2015)
04/07/2015	439	300	REPLY to Opposition to Motion re (435 in 3:11-cv-00054-CVG-RM) Opposition to Motion, *Motion for a Directed Verdict* filed by Defendant Elsa Emily Hall. (Attachments: # 1 Exhibit Exhibit A) Associated Cases: 3:13-cv-00095-CVG-RM, 3:11-cv-00054-CVG-RM (Bleecker, Michelle) (Entered: 04/07/2015)
04/14/2015	443	306	REPLY to Opposition to Motion re (437 in 3:11-cv-00054-CVG-RM) Opposition to Motion, filed by Defendant Elsa Emily Hall. Associated Cases: 3:13-cv-00095-CVG-RM,

			3:11-cv-00054-CVG-RM (Bleecker, Michelle) (Entered: 04/14/2015)
04/23/2015	445	307	ORDER (USCA) the appeal is STAYED pending disposition of the two pending motions (426 in 3:11-cv-00054-CVG-RM) Notice of Appeal filed by Elsa Emily Hall Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (KAB) (Entered: 05/04/2015)
03/30/2016	452	315	ORDER (CVG) The motion for judgment as a matter of law is DENIED; a new trial in the Samuel Hall Action is GRANTED; the motion for attorneys fees and costs is DENIED insofar as it seeks recovery in the Trust Action; the motion for attorneys fees and costs is MOOT insofar as it seeks recovery in the Samuel Hall Action; and by no later than 3:00 PM on Monday, April 11, 2016, Samuel Hall and Hall & Griffith, P.C., shall, to the extent they wish to do so, submit an amended bill of costs in the

			Trust Action. (AFS) (Entered: 03/30/2016)
04/10/2016	454	316	MOTION for Reconsideration re (452 in 3:11-cv-00054-CVG-RM, 452 in 3:11-cv-00054-CVG-RM, 452 in 3:11-cv-00054-CVG-RM, 452 in 3:11-cv-00054-CVG-RM, 315 in 3:13-cv-00095-CVG-RM, 315 in 3:13-cv-00095-CVG-RM, 315 in 3:13-cv-00095-CVG-RM, 315 in 3:13-cv-00095-CVG-RM) Order on Motion for Judgment NOV, Order on Motion for New Trial, Order on Motion for Attorney Fees by Plaintiff Samuel H Hall, Jr. (Attachments: # 1 Text of Proposed Order Proposed Order) Associated Cases: 3:11-cv-00054-CVG-RM, 3:13-cv-00095-CVG-RM (Thomas-Griffith, Marie) (Entered: 04/10/2016)
03/22/2017	460	357	MANDATE as to (426 in 3:11-cv-00054-CVG-RM) Notice of Appeal filed by Elsa Emily Hall (Attachments: # 1 Opinion dd 2/10/2017, # 2 Judgment dd 2/10/2017) Associated Cases: 3:11-cv-00054-CVG-RM,

			3:13-cv-00095-CVG-RM (KAB) (Entered: 03/23/2017)
03/30/2017	463	376	ORDER (CVG) Samuel Hall's motion to reconsider docketed in at ECF Number 454 is DENIED. (BRW) (Entered: 03/30/2017)
04/05/2017		407	Minute Entry for proceedings held before District Judge Curtis V. Gomez: Jury trial held on 4/5/2017. (Court Reporter Chandra Kean.) (Attachments: # 1 Exhibit Sheet, # 2 Exhibit continuation of exhibit sheet) (CAB) (Entered: 04/05/2017)
04/06/2017		417	JURY VERDICT in favor of plaintiff (CAB) (Entered: 04/10/2017)

General Docket

Third Circuit Court of Appeals

Court of Appeals Docket #: 15-1564

Elsa Hall v. Samuel Hall, et al.

03/10/2015	CIVIL CASE DOCKETED. Notice filed by Appellant Elsa Hall in District Court No. 3-11-cv-00054. (SB)
03/31/2015	ECF FILER: Motion filed by Appellees Samuel Hall and Hall & Griffith PC to dismiss case or Stay Appeal. Certificate of Service dated 03/31/2015. SEND TO MERITS – [Edited 05/24/2016 by SLC] (MET)
04/10/2015	ECF FILER: Response filed by Appellant Elsa Hall to Motion to dismiss case for lack of jurisdiction. Certificate of Service dated 04/10/2015. SEND TO MERITS – [Edited 05/24/2016 by SLC] (ACS)
04/15/2015	ECF FILER: Reply by Appellees Samuel Hall and Hall & Griffith PC to Response Motion to dismiss case for lack of jurisdiction, Response, filed. Certificate of Service dated 04/15/2015. SEND TO MERITS – [Edited 05/24/2016 by SLC] (MET)
04/23/2015	CLERK ORDER – RULE 4(a)(4) staying case pending disposition of post decision motion(s). (SLC)
05/24/2016	ORDER (CHAGARES, GREENAWAY JR. and RESTREPO, Circuit Judges) referring to the merits panel the Motion to dismiss appeal filed by Appellees Samuel Hall and Hall & Griffith PC,

	Response filed by Appellant Elsa Hall and Reply by Appellees Samuel Hall and Hall & Griffith PC. The Clerk is directed to issue a briefing schedule in this matter. The parties are directed to address the issue of this Court's jurisdiction in their briefs, filed. Panel No.: GCO-003. Restrepo, Authoring Judge. (SLC)
06/02/2016	ECF FILER: Second Motion filed by Appellees Samuel Hall and Hall & Griffith PC to dismiss case for lack of jurisdiction. Certificate of Service dated 06/02/2016. SEND TO MERITS – [Edited 07/13/2016 by SLC] (MET)
06/02/2016	ECF FILER: Response filed by Appellant Elsa Hall to Motion to dismiss case for lack of jurisdiction. Certificate of Service dated 06/02/2016. SEND TO MERITS – [Edited 07/13/2016 by SLC] (ACS)
06/08/2016	ORDER (Clerk) referring to a motions panel the Motion to Stay Briefing Schedule, Response, Motion to Dismiss, and Response. The briefing schedule is hereby temporarily stayed pending the Court's decision on the motion to stay the briefing schedule and the motion to dismiss the appeal for lack of jurisdiction. If the motion to dismiss the appeal for lack of jurisdiction is denied or referred to the merits panel, Appellant's brief and appendix must be filed within 30 days of the date of the order referring the motion, filed. (SLC)

06/09/2016	ECF FILER: Reply by Appellees Samuel Hall and Hall & Griffith PC to Response Response, Motion to dismiss case for lack of jurisdiction, filed. Certificate of Service dated 06/09/2016. (MET)
07/13/2016	ORDER (CHAGARES, GREENAWAY JR. and RESTREPO, Circuit Judges) denying Motion by Appellees to stay the briefing schedule. The temporary stay is lifted. The second motion by Appellee to dismiss appeal and Appellant's response thereto are referred to the merits panel. Appellant's brief and appendix must be filed and served within 30 days from the date of this order. The parties are directed to address jurisdiction in their briefs, filed. Panel No.: GCO-030. Restrepo, Authoring Judge. (SLC)
12/12/2016	ARGUED on Monday, December 12, 2016 in St. Thomas, USVI. Panel: CHAGARES, JORDAN and HARDIMAN, Circuit Judges. Andrew C. Simpson arguing for Appellant Elsa Hall; Marie E. Thomas-Griffith arguing for Appellees Samuel Hall, Hall & Griffith PC, (CMH)
2/10/2017	NOT PRECEDENTIAL OPINION Coram: CHAGARES, JORDAN and HARDIMAN, Circuit Judges. Total Pages: 8. Judge: JORDAN Authoring. Samuel also filed a motion to strike the Estate's brief and appendix. Because we are

	dismissing for lack of jurisdiction, we do not consider that motion. (KR)
2/10/2017	JUDGMENT, Ordered and Adjudged by this Court that the appeal is dismissed for lack of jurisdiction. All of the above in accordance with the opinion of this Court. The parties are to bear their own costs. (KR)
03/22/2017	MANDATE ISSUED, filed. (SLC)
03/24/2017	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Elsa Hall on 03/17/2017 and placed on the docket 03/23/2017 as Supreme Court Case No. 16-1150. (CND)

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ELSA HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHLYN LOUISE HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST, PLAINTIFF, V. SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C., DEFENDANTS.	CIV. NO. 3:11-CV-54 ACTION FOR DAMAGES AND FOR AN ACCOUNTING JURY TRIAL DEMANDED

COMPLAINT

(Filed Jan. 21, 2013)

COMES NOW Plaintiff, Elsa Hall as Personal Representative of the Estate of Ethlyn L. Hall and as successor trustee of The Ethlyn Louise Hall Family Trust, and respectfully avers:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 as the parties are of diverse citizenship and the amount in controversy exceeds $75,000.

2. The District of the Virgin Islands is an appropriate venue as both defendants are citizens of the U.S. Virgin Islands and a substantial part of the events giving rise to this claim occurred within the U.S. Virgin Islands.

PARTIES

3. Ethlyn Louise Hall permanently resided and was domiciled in the State of Florida from April 23, 2011 until her death on May 5, 2012. During that period, she was a citizen of the State of Florida.

4. Until her death, Ethlyn Louise Hall was the sole trustee of The Ethlyn Louise Hall Family Trust (hereinafter the "Trust"), an inter vivos trust dated December 15, 2010 as amended from time to time.

5. Plaintiff Elsa Hall permanently resides and is domiciled in the State of Florida.

6. Elsa Hall is the successor trustee of the Trust as, in accordance with the express terms of the trust, she became the sole trustee of the Trust upon the death of Ethlyn Louise Hall.

7. As of December 15, 2010, The Trust became the legal owner of the tangible and intangible real and personal property of Ethlyn Louise Hall.

8. On April 22, 2011, Ethlyn Louise Hall executed a document specifically transferring to the Trust all intangible property she owned, and specifically included any and all causes of action she had "against her son, Samuel H. Hall."

9. As successor trustee, Elsa Hall is authorized to pursue all claims belonging to the Trust.

10. The last will and testament of Ethlyn Louise Hall named her daughter, Elsa Emily Hall, as her Personal Representative.

11. The last will and testament of Ethlyn Louise Hall bequeathed "the rest and residue of my property real, personal and mixed of every kind and nature wheresoever situated" to the Trust.

12. On May 11, 2012, Elsa Hall filed a petition for administration of the Estate of Ethlyn L. Hall in the Probate Division of the Circuit Court for Miami-Dade County, Florida and the matter was assigned case no. 12-1741 CP 05.

13. As Personal Representative, Elsa Hall has the legal authority to pursue all claims belonging to the Estate of Ethlyn L. Hall.

14. Defendant Samuel H. Hall, Jr. ("Defendant Hall") is a citizen of St. Thomas, U. S. Virgin Islands.

15. Hall & Griffith, P.C. ("Defendant Hall & Griffith") is a citizen of St. Thomas, U.S. Virgin Islands. It is incorporated in the Virgin Islands as a professional corporation. Its principal place of business is in St. Thomas, U.S. Virgin Islands.

16. Defendant Hall is a principal of Defendant Hall & Griffith.

FACTUAL BACKGROUND

17. Ethlyn Louise Hall is the mother of the Defendant Hall and Plaintiff Elsa Hall.

18. Defendant Hall served as Ethlyn Louise Hall's attorney for over twenty years and in that capacity served as her trusted advisor and agent on all of her business matters.

19. At all times relevant hereto, Defendant Hall and/or Hall & Griffith, P.C. acted as attorney and/or agent of Ethlyn Louise Hall.

20. On August 4, 2007, Ethlyn Louise Hall allegedly signed a Power of Attorney in favor of Defendant Hall, a copy of which is a part of the record of this matter as Doc. No. 1-1. This document was not notarized.

21. On August 13, 2008, Ethlyn Louise Hall allegedly signed another Power of Attorney in favor of Defendant Hall, which was notarized by Defendant Hall's law partner, Marie Thomas-Griffith, also a principal of Defendant Hall & Griffith. A copy of the August 13, 2008 Power of Attorney is a part of the record in this matter as Doc. No. 1-2.

22. Both of the powers of attorney (Doc. Nos. 1-1 and 1-2) were prepared by Defendant Hall as a part of his legal practice and were done in his capacity as an attorney acting on behalf of Ethlyn Louise Hall.

23. At all material times, until approximately April 19, 2002, Ethlyn Louise Hall was the owner of the plot of land known as Parcel 17, Estate Peter Bay, St. John.

24. On or about April 19, 2002, Ethlyn Louise Hall subdivided Parcel 17 into seven separate subplots, (Parcels 17-1 through 17-7) with certain

separate plots to be gifted to her children and/or grandchildren.

25. On April 19, 2002, Ethlyn Louise Hall executed a Deed of Gift granting Defendant Hall the real property described as follows:

    Parcel No. 17-5, Estate Peter Bay, No. 2aa Maho Bay Quarter, St. John, U. S. Virgin Islands consisting of 1.161 acre, more or less.

26. On the same date, Ethlyn Louise Hall made the following gifts:

    a. Parcel 17-2 to her daughter Elsa Hall;

    b. Parcel 17-4 to her daughter Phyllis Hall Brin; and

    c. Parcel 17-6 to her granddaughter Yassin Hall Young.

27. Defendant Hall represented Ethlyn Louise Hall in the aforementioned transactions, drawing up the legal documents to accomplish the gifts and recording same.

28. From April 19, 2002, until December 15, 2010, Ethlyn Louise Hall was the owner of the plot of land known as Parcel 17-7, Estate Peter Bay on St. John, U.S. Virgin Islands.

29. On December 15, 2010, Ethlyn Louise Hall transferred all of her property, including Parcel 17-7, Estate Peter Bay, to the Trust.

30. On January 24, 2003, Ethlyn Louise Hall, as Landlord, entered into a Ground Lease ("2003 Ground Lease") with Andrews St. John Trust, as

Tenant (hereinafter "Andrews"), wherein Ethlyn Louise Hall leased Parcel No. 17-7 to Andrews for a period of fifty years, with Andrews to design and build two cottages at Andrews' sole expense – the first cottage of approximately 24 feet by 24 feet on Parcel 17-6 owned by Yassin Hall Young (the "First Cottage") and the second cottage of approximately 24 feet by 24 feet on Parcel 17-4 owned by Phyllis Hall Brin (the "Second Cottage").

31. The Lease provided that if the First Cottage was not completed within two years from the date of the Lease, Andrews was to pay rent of $5,000 per month ($2,500 to Yassin Hall Young and $2,500 to Phyllis Hall Brin) until the date of completion, and if the Second Cottage was not completed within four years of the date of the Lease, Andrews was to pay $2,500 per month to Phyllis Hall Brin

32. Additionally, if the two cottages were not completed, Ethlyn Louise Hall, Phyllis Hall Brin and Yassin Hall Young retained the right to seek injunctive relief and to sue for specific performance and would be granted a first priority lien on any improvements constructed on Parcel 17-7 by Andrews and on any income derived by Andrews from the use and enjoyment of Parcel 17-7.

33. A complete copy of the 2003 Ground Lease is a part of the record of this case as Doc. No. 1-3.

34. Pursuant to the terms of the 2003 Ground Lease, Andrews was also obligated to reimburse Ethlyn Louise Hall for all property taxes on Parcel 17-7,

including all property taxes on any improvements thereon.

35. The 2003 Ground Lease was drafted by Defendant Hall, as attorney for Ethlyn Louise Hall.

36. Defendant Hall, in his capacity as attorney for Ethlyn Louise Hall, managed the collection of rent under the terms of the 2003 Ground Lease; the reimbursement of property taxes to Ethlyn Louise Hall; and the construction of the two cottages.

37. On August 3, 2007, Defendant Hall drafted, and Ethlyn Louise Hall allegedly signed, a document asserting her agreement to allow Defendant Hall to halt or postpone construction on the cottage at Parcel 17-4, owned by Phyllis Hall Brin, and to reprogram the money from the 2003 Ground Lease that was to be utilized in the building of that cottage in favor of the construction of a house on Parcel 17-5 owned by Defendant Hall. This document states that the consideration for this agreement was to permit Defendant Hall "to complete his home in order to expedite his assistance of me in my future care on St. John." A copy of this document is a part of the record in this matter as Doc. No. 1-4.

38. The next day, on August 4, 2007, Defendant Hall drafted, and Ethlyn Louise Hall allegedly signed, an Assignment wherein Ethlyn Louise Hall assigned all of her interest in the 2003 Ground Lease to Defendant Hall in consideration for his "assistance with her future care and upkeep". A copy of said Assignment is a part of the record in this matter as Doc. No. 1-5.

39. At the time of the alleged execution of Doc. Nos. 1-4 and 1-5,, Defendant Hall was Ethlyn Louise Hall's attorney.

40. At no time did Defendant Hall ever provide Ethlyn Louise Hall with an accounting of the rent collected under the 2003 Ground Lease; nor did he account for or otherwise explain to Ethlyn Louise Hall how funds were spent on the construction of the cottages or on Defendant Hall's house under the terms of the 2003 Ground Lease.

41. Defendant Hall also failed to account for funds received for the reimbursement of property taxes on Plot 17-7.

42. Defendant Hall failed to advise Ethlyn Louise Hall as to any income he received on her behalf so that she could properly report same to the Virgin Islands Internal Revenue Bureau for the appropriate year when the income was received. Either the Trust or the Estate of Ethlyn L. Hall are responsible for any back taxes, penalties and interest owed as a result of such failure.

43. In August 2010, Ethlyn Louise Hall sent letters to Defendant Hall requesting that he provide her with a complete accounting of her financial obligations with regard to Parcel 17-7, and requesting information on the reimbursement of the property taxes paid on Parcel 17-7. Defendant Hall failed to respond to Ethlyn Louise Hall's requests for information.

44. In approximately March 2011, Ethlyn Louise Hall learned that on or about October 28, 2009 Defendant Hall, purporting to act "individually

and as attorney-in-fact for" Ethlyn Louise Hall, entered into an "Early Termination of Lease, Mutual Release and Estoppel Certificate" ("Release") with Andrews, releasing Andrews from any further obligation under the terms of the 2003 Ground Lease. A copy of the Release is a part of the record in this matter as Doc. No. 1-6. Ethlyn Louise Hall was not aware of this transaction at the time that Defendant Hall entered into it in October 28, 2009.

45. In approximately March 2011, Ethlyn Louise Hall learned that Defendant Hall, acting as attorney in fact for Ethlyn Louise Hall, entered into a Lease Agreement dated December 2, 2008 ("2008 Lease") with Talton Family Trust ("Talton") leasing Parcel 17-7 to Talton for a period of 75 years, with rent payment to be a lump sum of $800,000, payable to Defendant Hall, as "agent and attorney in fact" for Ethlyn Louise Hall, and obligating Talton to reimburse Ethlyn Louise Hall for all property taxes on Parcel 17-7. A copy of the 2008 Lease is a part of the record in this matter as Doc. No. 1-7. Ethlyn Louise Hall was not aware of this transaction when Defendant Hall signed it on December 2, 2008.

46. According to a Closing Statement signed by Defendant Hall as attorney in fact for Ethlyn Louise Hall,, Defendant Hall received, on Ethlyn Louise Hall's behalf, a total of $1,070,000 ($270,000 paid by Jack Andrews between November 6, 2003 and November 23, 2007 and $800,000 paid by Jack Andrews and David Talton between January 14, 2008 and February 23, 2010). A copy of the

closing statement is a part of the record in this matter as Doc. No. 1-8.

47. As of this date, Ethlyn Louise Hall has received no funds for monies collected under the 2003 Ground Lease and the 2008 Lease.

48. Defendant Hall has not provided an accounting to Ethlyn Louise Hall with regard to the $1,070,000 allegedly collected on her behalf at the closing of the lease transaction on February 19, 2010 and Ethlyn Louise Hall is unaware of the location of those funds.

49. Despite Defendant' Hall's promise to Ethlyn Louise Hall to provide for her and assist in her care on St. John, Defendant Hall failed to provide Ethlyn Louise Hall with adequate monetary assistance for her needs.

50. In early February 2011, Ethlyn Louise Hall received a letter from Defendant Hall dated February 1, 2011, informing Ethlyn Louise Hall that the Lease on Parcel 17-7 generated a capital gain in 2010 totaling $1,070,000 that was subject to a capital gains tax of 15%. A copy of this letter is a part of the record in this matter as Doc. No. 1-9. In the letter, Defendant Hall acknowledged that he, Phyllis Hall Brin and Yassin Hall Young all benefitted from these funds, through the building of their houses on Parcels 17-5, 17-4 and 17-6, respectively, but stated that Ethlyn Louise Hall must pay the capital gains tax on the amount in full and Defendant Hall and the other beneficiaries would reimburse Ethlyn Louise Hall for their respective shares received as a "gift" from Ethlyn Louise Hall.

51. The February 1, 2011 letter was the first notice to Ethlyn Louise Hall that she had any capital gain or other income in 2010 from the Parcel 17-7.

52. Defendant Hall, through Defendant Hall & Griffith, generated a Form 1099-S stating that Ethlyn Louise Hall received gross proceeds of $1,070,000 on February 19, 2010. A copy of the Form 1099-S is a part of the record in this matter as Doc. No. 1-10.

53. Defendant Hall asserts that the funds from the 2003 Ground Lease that he received through the August 3, 2007 Agreement (Doc. No. 1-4) and the August 4, 2007 Assignment (Doc. No. 1-5) were a gift to him from Ethlyn Louise Hall.

54. Despite continuing requests to Defendant Hall that he provide a full accounting of all funds collected and expended on Ethlyn Louise Hall's behalf, Defendant Hall has failed to provide the requested documents.

55. Despite continuing requests that Defendant Hall and Defendant Hall and Griffith turn over a complete copy of Ethlyn Louise Hall's files, Defendants have refused to do so.

COUNT I – BREACH OF FIDUCIARY DUTY ARISING OUT OF ATTORNEY-CLIENT RELATIONSHIP

56. By virtue of Defendant Hall's attorney-client relationship with Ethlyn Louise Hall, he and his law firm Hall and Griffith, P.C. were Ethlyn Louise Hall's agent at all material times alleged in this complaint.

57. As Ethlyn Louise Hall's agent, Defendants owed Ethlyn Louise Hall an absolute duty of loyalty and had a fiduciary duty to act in Ethlyn Louise Hall's best interests.

58. Defendants breached their fiduciary duty to Ethlyn Louise Hall:

a. by failing to maintain adequate records of all transactions entered into on behalf of Ethlyn Louise Hall;

b. by failing to provide Ethlyn Louise Hall with an accounting of all monies collected and expended on her behalf;

c. by failing to maintain communication with Ethlyn Louise Hall;

d. by altering the terms of or canceling contracts to which Ethlyn Louise Hall was a party without consulting her and obtaining her consent beforehand;

e. by entering into agreements with Ethlyn Louise Hall with regard to her assets that benefitted Defendant Hall personally (inherent conflict of interest);

f. by failing to collect monies due Ethlyn Louise Hall under the terms of the 2003 Ground Lease;

g. by failing to account for funds collected under the terms of the 2003 Ground Lease and the 2008 Lease;

h. by failing either to structure Ethlyn Louise Hall's financial transactions to avoid

unnecessary tax obligations or to obtain appropriate guidance from a tax expert so that Ethlyn Louise Hall's tax obligations could be minimized;

i. by failing to keep Ethlyn Louise Hall informed as to the actions Defendants took that were purportedly on behalf of Ethlyn Louise Hall so that Ethlyn Louise Hall could make appropriate financial and tax plans;

j. by failing to properly safeguard Ethlyn Louise Hall's property; and

k. by failing to act solely in the interest of Ethlyn Louise Hall.

59. Ethlyn Louise Hall sustained damage, in the nature of property damage, due to Defendants breaches of their fiduciary duties.

60. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's cause of action under Count I and successor trustee Elsa Hall is the proper party to assert such a cause of action. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count I remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the cause of action and the proper party to assert it.

61. The exact amount of the damages is unknown at this time due to Defendants refusal to render an accounting. However, such damages include all

sums that Defendants have collected on behalf of Ethlyn Louise Hall and all sums necessary to hold her harmless from the tax consequences of Defendants conduct and misconduct.

62. Plaintiff is also entitled to a judgment ordering Defendants to turn over to her all of Ethlyn Louis Hall's property, including her legal files, maintained by Defendants.

63. Plaintiff is entitled to punitive damages due to Defendants breaches of fiduciary duties.

COUNT II – BREACH OF FIDUCIARY DUTY ARISING OUT OF POWER OF ATTORNEY

64. By virtue of Defendant Hall's claim to act under the authority of a power of attorney from Ethlyn Louise Hall, Defendant Hall was Ethlyn Louise Hall's agent at all times that he acted under such claim of authority.

65. As Ethlyn Louise Hall's agent, Defendant Hall owed Ethlyn Louise Hall an absolute duty of loyalty and had a fiduciary duty to act in Ethlyn Louise Hall's best interests.

66. Defendant Hall breached his fiduciary duty to Ethlyn Louise Hall:

a. by failing to maintain adequate records of all transactions entered into on behalf of Ethlyn Louise Hall;

b. by failing to provide Ethlyn Louise Hall with an accounting of all monies collected and expended on her behalf;

c. by failing to maintain communication with Ethlyn Louise Hall;

d. by altering the terms of or canceling contracts to which Ethlyn Louise Hall was a party without consulting her and obtaining her consent beforehand;

e. by entering into agreements with Ethlyn Louise Hall with regard to her assets that benefitted him personally (self-dealing);

f. by failing to collect monies due Ethlyn Louise Hall under the terms of the 2003 Ground Lease;

g. by failing to account for funds collected under the terms of the 2003 Ground Lease and the 2008 Lease;

h. by failing either to structure Ethlyn Louise Hall's financial transactions to avoid unnecessary tax obligations or to obtain appropriate guidance from a tax expert so that Ethlyn Louise Hall's tax obligations could be minimized;

i. by failing to keep Ethlyn Louise Hall informed as to the actions Defendant Hall took that were purportedly on behalf of Ethlyn Louise Hall so that Ethlyn Louise Hall could make appropriate financial and tax plans;

j. by failing to properly safeguard Ethlyn Louise Hall's property;

k. by failing to act solely in the interest of Ethlyn Louise Hall; and

l. by failing to provide necessary funds for Ethlyn Louise Hall's care and living expenses.

67. Ethlyn Louise Hall has sustained damages, in the nature of property damages, due to Defendant Hall's breach of his fiduciary duty.

68. The exact amount of Ethlyn Louise Hall's damages is unknown at this time due to Defendant Hall's refusal to render an accounting [] and all sums necessary to hold her harmless from the tax consequences of Defendant Hall's conduct and misconduct.

69. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's cause of action under Count II and successor trustee Elsa Hall is the proper party to assert such a cause of action. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count II remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the cause of action and the proper party to assert it.

70. Plaintiff is also entitled to a judgment ordering Defendant Hall to turn over to her all of Ethlyn Louis Hall's property, including her legal files, maintained by Defendant Hall

71. Plaintiff is entitled to punitive damages due to the nature and outrageous conduct involved in Defendant Hall's breach of fiduciary duty.

COUNT III – LEGAL MALPRACTICE

72. In rendering legal services to Ethlyn Louise Hall, Defendant Hall and Defendant Hall and Griffith, P.C. failed to exercise reasonable care and skill and negligently failed to inform her about the tax consequences of the 2003 and 2008 leases and the income (imputed or otherwise) from those leases.

73. Ethlyn Louise Hall reasonably relied on the advice and skill of Defendants.

74. As a proximate result of Defendants' negligent legal advice, Ethlyn Louise Hall incurred damages in the form of lost income from her real estate holdings, loss in value of the real estate due to the long term leases imposed upon it; unnecessary tax liabilities; and liability for taxes, penalty and interest that she would not owe but for the Defendants' negligence. These damages are in the nature of property damage.

75. The value of the Plot 17-7, Estate Peter Bay continues to be impaired due to the 75 year lease.

76. The Estate of Ethlyn L. Hall and/or the Trust face ongoing and uncertain liability for taxes, interest and penalties due to the Defendants' negligence.

77. The exact amount of the damages is unknown at this time due to Defendants' refusal to render an accounting and because the Virgin Islands Internal Revenue Bureau has not yet assessed interest and penalties. However, such damages include all sums that Defendant Hall has collected on behalf of Ethlyn Louise Hall and all sums necessary to hold her harmless from the tax

consequences of Defendants' conduct and misconduct.

78. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's cause of action under Count III and successor trustee Elsa Hall is the proper party to assert such a cause of action. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count III remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the cause of action and the proper party to assert it.

COUNT IV – CONVERSION OF PROPERTY

79. According to a closing statement (Doc. No. 1-8) prepared by Samuel H. Hall, Jr. and signed by Samuel H. Hall, Jr. as attorney in fact for Ethlyn Hall, between November 6, 2003 and November 23, 2007, Jack Andrews paid $270,000 towards the "purchase price" of "property" identified as a 75 year lease of Parcel 17-7, Estate Peter Bay.

80. That same closing statement (Doc. No. 1-8) represents that between January 14, 2008 and February 23, 2010, Jack Andrews and David Talton paid an additional $800,000 towards the purchase price.

81. Thus, the closing statement indicates that the total purchase price was $1,070,000.

82. On information and belief, the $800,000 in payments described in the closing statement (Doc. No. 1-8) refers to cash payments made by or on behalf of the Talton Family Trust representing the rent due under the 75 year lease (Doc. No. 1-7).

83. Article 6 of the 75 year lease (Doc. No. 1-7) specifies that $800,000 shall be paid to "Samuel H. Hall, Jr. as Landlord's agent and attorney in fact." Ethlyn L. Hall is identified as the "Landlord" in the 75 year lease.

84. Because Ethlyn Louise Hall owned Parcel 17-7, Estate Peter Bay until December 15, 2010, she was entitled to the payment of the rent specified in the 75 year lease when it was paid.

85. Because Ethlyn Louise Hall owned Parcel 17-7, Estate Peter Bay until December 15, 2010, she was entitled to payments made under that lease that were not expressly directed by her to be paid to others. Because Defendants have not provided an accounting of the $275,000 collected as described in Doc. No. 1-8, it is not possible without discovery or an accounting to determine whether all or a portion of that $275,000 (in addition to the $800,000) was due to be paid to Ethlyn Louise Hall.

86. Defendants disposed of funds valued at between $800,000 and $1,075,000 in a manner inconsistent with Ethlyn Louse Hall's property rights.

87. As such, Defendants wrongfully converted Ethlyn Louise Hall's property.

88. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's cause of action under Count IV and successor trustee Elsa Hall is the proper party to assert such a cause of action. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count IV remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the cause of action and the proper party to assert it.

COUNT V – CONVERSION OF LEGAL FILES

89. Defendant Samuel H. Hall, Jr. acted as Ethlyn Louise Hall's attorney for over 20 years and the attorney-client relationship did not end until some time after March 9, 2010.

90. Defendant Hall and Griffith, PC acted as Ethlyn Louise Hall's attorney from the date Hall and Griffith, PC was formed until some time after March 9, 2010. At the time Hall and Griffith, PC was formed, it became the custodian of Ethlyn Louise Hall's files for the entire period of Defendant Samuel H. Hall, Jr.'s representation of her.

91. In 2010 and 2011, Ethlyn Louise Hall demanded that Defendants provide her with a copy of her files.

92. Under Virgin Islands law, Ethlyn Louise Hall was the owner of those files and was entitled to immediate possession of them.

93. Defendants refused and failed to return Ethlyn Louise Hall's files to her and thereby wrongfully converted them

94. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's legal files as well as cause of action under Count V and successor trustee Elsa Hall is the proper party to now assert a cause of action to recover the files and to recover damages for conversion of the files. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count V remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the legal files and the cause of action and is the proper party to assert it.

95. Elsa Hall is entitled to an order directing the Defendants to deliver the files to her as well as an award of damages for the damage caused by the conversion of those files.

COUNT VI – FRAUD

96. In August 2007, Defendant Hall induced Ethlyn Louise Hall to sign documents purporting to reprogram funds from the 2003 Ground Lease for his benefit and induced her into assigning her interest in the 2003 Ground Lease to him by instructing her, in his capacity as her attorney, that she needed to sign the documents.

97. Defendant Hall was motivated to induce Ethlyn Louise Hall to sign these documents because he stood to personally benefit from them.

98. As a result of Defendant Hall's actions, he has wrongfully converted for his personal benefit at least $800,000 and probably substantially more.

99. Moreover, the alleged consideration for Ethlyn Louise Hall to sign these documents was Defendant Hall's promise to provide for Ethlyn Louise Hall's future care and upkeep. This promise was false when made, as Defendant Hall now asserts that funds he received from the 2003 Ground Lease were a gift to him from Ethlyn Louise Hall.

100. Moreover, Defendant Hall's promise to provide undefined future care was illusory and unenforceable.

101. Defendant Hall's actions were taken with the intention of unlawfully converting Ethlyn Louise Hall's assets to his personal use.

102. Ethlyn Louise Hall justifiably relied on Defendant Hall's instructions to sign documents as he is her son and had served as her attorney for over twenty years and she believed that he had her best interests at heart.

103. As a proximate cause of Defendant Hall's fraud, Ethlyn Louise Hall incurred damages due to the loss of the funds improperly diverted for Defendant Hall's personal use.

104. The exact amount of Ethlyn Louise Hall's damages is unknown at this time due to Defendant Hall's refusal to render an accounting.

105. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's cause of action under Count VI and successor trustee Elsa Hall is the proper party to assert such a cause of action. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count VI remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the cause of action and the proper party to assert it.

106. Ethlyn Louise Hall is entitled to an award of punitive damages due to Defendant Hall's fraud.

COUNT VII - UNJUST ENRICHMENT

107. Defendant Hall was enriched by taking funds belonging to Ethlyn Louise Hall for his own benefit.

108. Defendant Hall was further enriched by taking, for his own benefit, funds/benefits gifted by Ethlyn Louise Hall to Phyliss Hall Brin and possibly others.

109. The enrichment to Defendant Hall's benefit was at Ethlyn Louise Hall's expense as she was personally entitled to the receipt of $800,000 and was entitled to the benefit of having provided a gift to Phyliss Hall Brin.

110. By virtue of Defendant Hall's actions, Ethlyn Louise Hall was denied the $800,000 as well as the disposition of gifts to Phyliss Hall Brin as she had desired.

111. The circumstances of Defendant Hall's actions – self-dealing and acting in a manner that was in conflict with the interests of his client – are such that in equity and good conscience, Defendant Hall should be required to return the funds he unjustly obtained to either the Trust or Ethlyn Louise Hall's Estate.

COUNT VIII – ACCOUNTING

112. Defendant Hall and/or Defendant Hall and Griffith has received funds as described above, in an unknown amount, which are properly due and owing to Ethlyn Louise Hall.

113. Ethlyn Louise Hall has demanded a full accounting from Defendant Hall on several occasions and Defendant Hall has refused to provide the same.

114. The amount of money due to Ethlyn Louise Hall is unknown due to Defendant Hall's failure to render an accounting.

115. By virtue of the transfer of all of Ethlyn Louise Hall's property to the Trust, the Trust is the owner of Ethlyn Louise Hall's cause of action under Count VIII and successor trustee Elsa Hall is the proper party to assert such a cause of action. Alternatively, to the extent that the cause of action is not assignable or the law of the case holds that the cause of action under Count VIII remained the property of Ethlyn Louise Hall at the time of her death, then Elsa Hall in her capacity as the Personal Representative of the Estate of Ethlyn L. Hall is the owner of the cause of action and the proper party to assert it.

116. Plaintiff requires this Court's intervention to order Defendant Hall and/or Defendant Hall & Griffith to provide an accounting of all transactions concerning Ethlyn Louise Hall's property and contractual obligations from January 24, 2003 to the present.

117. Plaintiff requires an immediate accounting of all transactions which resulted in an alleged $1,070,000 capital gains in 2010 so that the Estate of Ethlyn L. Hall can properly prepare a tax return and calculate her tax obligation for 2010 and possibly to file amended returns for 2010 and past years.

COUNT IX – CONSTRUCTIVE TRUST

118. By reason of the fraudulent and otherwise wrongful manner in which Defendant Hall obtained and converted money belonging to Ethlyn Louise Hall for his personal benefit he is an involuntary trustee of the property belonging to the Ethlyn Louise Hall and said property and all profits and improvements therefrom are held in constructive trust for Ethlyn Louise Hall, either individually or as trustee for the Trust, and Defendant Hall has a duty to promptly convey same to her.

COUNT X - EQUITABLE LIEN

119. By reason of the fraudulent and otherwise wrongful manner in which Defendant Hall obtained and converted money belonging to Ethlyn Louise Hall for his personal benefit in constructing his house on Parcel 17-5, Estate Peter Bay, Ethlyn Louise Hall, individually and as trustee for the Trust, is entitled to the imposition of an equitable lien on Parcel 17-5, Estate Peter Bay, St. John, for all sums invested in such property.

120. Plaintiff is entitled to foreclosure of the equitable lien.

WHEREFORE, Plaintiff prays for judgment against Defendant Samuel H. Hall and Defendant Hall & Griffith, P.C. as follows:

1. For an order of expedited discovery for all documents relating to Ethlyn Louise Hall's income and expenses that are in the possession Defendant Hall or Defendant Hall & Griffith so that an immediate accounting can be performed as soon as is practicable;

2. For an accounting of all transactions concerning Ethlyn Louise Hall's property and contractual obligations from January 24, 2003 to the present;

3. For payment to Plaintiff of all sums due from Defendants as a result of the accounting;

4. For damages incurred due to Defendants' breach of fiduciary duty;

5. For damages incurred due to Defendants' malpractice;

6. For damages incurred due to Defendants' fraud;

7. For the imposition of a constructive trust upon all personal and real property owned or held by Defendant Hall;

8. For foreclosure of the equitable lien upon Parcel 17-5, Estate Peter Bay, St. John;

9. For punitive damages allowed by law;

10. For the return of all property belonging to the Estate or the Trust, including Ethlyn Louis Hall's legal files, that is held by either of the Defendants;

11. For reasonable attorneys fees incurred by Plaintiff;

12. For all costs incurred by Plaintiff; and

13. For such further relief as this Court deems just and equitable.

Plaintiff demands a jury trial on all issues triable to a jury.

Respectfully submitted,

Andrew C. Simpson, P.C.
Attorneys for Plaintiff

Dated: January 21, 2013

By: /s/ Andrew C. Simpson

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[Certificate Of Service Omitted]

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

ELSA HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHLYN LOUISE HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST, PLAINTIFF, v. SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C., DEFENDANTS.	CIVIL. NO. 3:11-CV-54 ACTION FOR DAMAGES FOR AN ACCOUNTING JURY TRIAL DEMANDED

DEFENDANTS' ANSWER TO THE AMENDED COMPLAINT

(Filed Feb. 28, 2013)

Defendants, by and through the undersigned attorneys hereby respond to the First Amended Complaint ("Complaint") as follows:

1. The allegations contained in Paragraph 1 of the Complaint are DENIED.

2. The allegations contained in Paragraph 2 of the Complaint are ADMITTED.

3. The allegations contained in Paragraph 3 of the Complaint are DENIED.

4. The allegations contained in Paragraph 4 of the Complaint are DENIED for lack of knowledge.

5. The allegations contained in Paragraph 5 of the Complaint are DENIED for lack of knowledge.

6. The allegations contained in Paragraph 6 of the Complaint are DENIED for lack of knowledge.

7. The allegations contained in Paragraph 7 of the Complaint are DENIED for lack of knowledge.

8. The allegations contained in Paragraph 8 of the Complaint are DENIED for lack of knowledge.

9. The allegations contained in Paragraph 9 of the Complaint are DENIED for lack of knowledge.

10. The allegations contained in Paragraph 10 of the Complaint are DENIED for lack of knowledge.

11. The allegations contained in Paragraph 11 of the Complaint are DENIED for lack of knowledge.

12. The allegations contained in Paragraph 12 of the Complaint are DENIED for lack of knowledge.

13. The allegations contained in Paragraph 13 of the Complaint are DENIED for lack of knowledge.

14. The allegations contained in Paragraph 14 of the Complaint are ADMITTED.

15. The allegations contained in Paragraph 15 of the Complaint are ADMITTED.

16. The allegations contained in Paragraph 16 of the Complaint are ADMITTED.

17. The allegations contained in Paragraph 17 of the Complaint are ADMITTED.

18. The allegations contained in Paragraph 18 of the Complaint are ADMITTED to the extent that it alleges Defendant Hall provided legal services to his mother for over twenty years. All of the other allegations in the paragraph are DENIED.

19. The allegations contained in Paragraph 19 of the Complaint are DENIED.

20. The allegations contained in Paragraph 20 of the Complaint are ADMITTED to the extent that it indicates that Ethlyn Louise Hall signed a power of attorney on August 4,2007, giving to her son, Defendant Hall, the power to act on her behalf, a copy of which was attached to the initial complaint, and it is not notarized.

21. The allegations contained in Paragraph 21 of the Complaint are ADMITTED to the extent that it indicates that Ethlyn Louise Hall signed a power of attorney on August 13, 2008, giving to her son, Defendant Hall, the power to act on her behalf, a copy of which was attached to the initial complaint, and it

is notarized by Marie ThomasGriffith, a principal in Hall & Griffith, P.C.

22. The allegations contained in Paragraph 22 of the Complaint are DENIED to the extent that it alleges that the two powers of attorney referred to above were prepared by Defendant Hall as part of the law practice of Hall & Griffith, P.C., or prepared solely in his capacity as an attorney for his mother, Ethlyn Hall. They were prepared primarily in his capacity as her son, utilizing his skills as a lawyer and person knowledgeable about construction, and in furtherance of her interests and like all legal matters he handled for her he did so at no cost to her.

23. The allegations contained in Paragraph 23 of the Complaint are DENIED. In 1999, Ethlyn Hall conveyed an acre to Elsa Hall, in exchange for her quit-claiming her interest in Parcel 156 and 157 Estate Contant and Enighed St. John back to Ethlyn Hall and Phyllis Hall, leaving the Remainder of Parcel 17 to be subdivided.

24. The allegations contained in Paragraph 24 of the Complaint are DENIED to the extent that it alleges Parcel 17 was subdivided on April 19, 2002 into seven subplots. Following the conveyance of an acre to Elsa Hall in 1999, on April 19, 2002, Ethlyn Hall conveyed an additional 1.2 acres to Elsa Hall, a 1.1 acre parcel to Samuel Hall, a 1.1 acre to Phyllis Hall Brin and Parcel 17-6 to Yassin Hall. She subsequently conveyed Parcel 17-3

and 17-B to St. John Land Investment Partnership.

25. The allegations contained in Paragraph 25 of the Complaint are ADMITTED.

26. The allegations contained in Paragraph 26 of the Complaint are ADMITTED.

27. The allegations contained in Paragraph 27 of the Complaint are ADMITTED. He prepared them at no cost to her and paid the cost of doing so.

28. The allegations contained in Paragraph 28 of the Complaint are DENIED. She owned Parcel 17-7 up to the date of her death.

29. The allegations contained in Paragraph 29 of the Complaint are DENIED to the extent that it alleges such a transfer as if it were valid.

30. The allegations contained in Paragraph 30 of the Complaint are ADMITTED.

31. The allegations contained in Paragraph 31 of the Complaint are ADMITTED.

32. The allegations contained in Paragraph 32 of the Complaint are ADMITTED.

33. The allegations contained in Paragraph 33 of the Complaint are ADMITTED.

34. The allegations contained in Paragraph 34 of the Complaint are ADMITTED.

35. The allegations contained in Paragraph 35 of the Complaint are ADMITTED to the extent that it alleges that Defendant Hall drafted the Ground Lease as attorney for Ethlyn Hall without also stating he did so primarily as her son at no cost to her.

36. The allegations contained in Paragraph 36 of the Complaint are DENIED. Under the 2003 Ground Lease, it was the obligation of the tenant to build the improvements constituting the rent and to reimburse Ethlyn Hall the property taxes.

37. The allegations contained in Paragraph 37 of the Complaint are DENIED as stated. Per the terms of the statement (Doc. 1-4), addressed to whom it may concern, Ethlyn Hall confirmed her willingness to allow her son to halt or postpone the construction of the cottage of Phyllis Hall on Parcel No. 17-4 Peter Bay, St. John, in favor of the construction of his home on Parcel No. 17-5, and to reprogram money from the Tenant under the Ground Lease for the construction of his home in order to expedite his assistance of her in her future care on St. John. The document is not an agreement, and states no consideration. Rather, it states her motivation in reprogramming the funds.

38. The allegations contained in Paragraph 38 of the Complaint are DENIED to the extent that it alleges documents were drafted on August 4, 2007, and that Ethlyn Hall "allegedly" signed the Assignment. The allegations

are ADMITTED to the extent that they state that the Assignment is part of the record as Doc. 1-5, and assigned to Defendant Hall her rights as Landlord under the 2003 Ground Lease.

39. The allegations contained in Paragraph 39 of the Complaint are DENIED as to any "alleged" execution. They are ADMITTED to the extent that it alleges that Defendant Hall was the attorney of Ethlyn Hall at the time that she executed Doc. No. 1-4 and 1-5 but he also, primarily, was her son seeking to accomplish her desires and further her interests.

40. The allegations contained in Paragraph 40 of the Complaint are DENIED.

41. The allegations contained in Paragraph 41 of the Complaint are DENIED.

42. The allegations contained in Paragraph 42 of the Complaint are DENIED.

43. The allegations contained in Paragraph 43 of the Complaint are DENIED.

44. The allegations contained in Paragraph 44 of the Complaint are DENIED.

45. The allegations contained in Paragraph 45 of the Complaint are DENIED.

46. The allegations contained in Paragraph 46 of the Complaint are DENIED.

47. The allegations contained in Paragraph 47 of the Complaint are DENIED. She received

the value she expected to receive in the form of improvements on the property of Phyllis Hall Brin, Yassin Hall and Samuel Hall.

48. The allegations contained in Paragraph 48 of the Complaint are DENIED.

49. The allegations contained in Paragraph 49 of the Complaint are DENIED.

50. The allegations contained in Paragraph 50 of the Complaint are ADMITTED to the extent that it alleges that In early February 2011, Ethlyn Louise Hall received a letter from Defendant Hall dated February 1, 2011, informing her that the Lease on Parcel 17-7 generated a capital gain totaling $1,070,000 was subject to a capital gains tax of 15%, and that a copy of the letter is a part of the record in this matter as Doc. No. 1-9, and that in the letter, Defendant Hall acknowledged that he, Phyllis Hall Brin and Yassin Hall Young all benefitted from these funds, through the improvements made on their respective parcels, and that he and the other beneficiaries are expected to pay their respective share of the tax. All other allegations are DENIED.

51. The allegations contained in Paragraph 51 of the Complaint are DENIED.

52. The allegations contained in Paragraph 52 of the Complaint are ADMITTED to the extent that they allege that Defendant Hall prepared a Form 1099-S and filed it with the Virgin Islands Bureau of Internal Revenue showing Ethlyn Hall received $1,070,000 for

the sale of a long-term lease on February 19, 2010, which is when the Tenant fulfilled its obligation to consummate the purchase of the lease by funding certain capital improvements.

53. The allegations contained in Paragraph 53 of the Complaint are ADMITTED to the extent that it alleges that he received assistance under the 2003 Ground Lease as a gift to him from his mother, to the same extent as did Phyllis Hall Brin and Yassin Hall.

54. The allegations contained in Paragraph 54 of the Complaint are DENIED.

55. The allegations contained in Paragraph 55 of the Complaint are DENIED.

COUNT I

BREACH OF FIDUCIARY DUTY ARISING OUT OF ATTORNEY-CLIENT RELATIONSHIP

56. The allegations contained in Paragraph 56 of the Complaint are DENIED.

57. The allegations contained in Paragraph 57 of the Complaint are DENIED.

58. The allegations contained in Paragraph 58 of the Complaint are DENIED.

59. The allegations contained in Paragraph 59 of the Complaint are DENIED.

60. The allegations contained in Paragraph 60 of the Complaint are DENIED.

61. The allegations contained in Paragraph 61 of the Complaint are DENIED.

62. The allegations contained in Paragraph 62 of the Complaint are DENIED.

63. The allegations contained in Paragraph 63 of the Complaint are DENIED.

64. The allegations contained in Paragraph 64 of the Complaint are ADMITTED.

COUNT II – BREACH OF FIDUCIARY DUTY ARISING OUT OF POWER OF ATTORNEY

65. The allegations contained in Paragraph 65 of the Complaint are DENIED as to the duty of loyalty being absolute.

66. The allegations contained in Paragraph 66 of the Complaint are DENIED.

67. The allegations contained in Paragraph 67 of the Complaint are DENIED.

68. The allegations contained in Paragraph 68 of the Complaint are DENIED.

69. The allegations contained in Paragraph 69 of the Complaint are DENIED.

70. The allegations contained in Paragraph 70 of the Complaint are DENIED.

71. The allegations contained in Paragraph 71 of the Complaint are DENIED.

COUNT III – LEGAL MALPRACTICE

72. The allegations contained in Paragraph 72 of the Complaint are DENIED.

73. The allegations contained in Paragraph 73 of the Complaint are DENIED.

74. The allegations contained in Paragraph 74 of the Complaint are DENIED.

75. The allegations contained in Paragraph 75 of the Complaint are DENIED.

76. The allegations contained in Paragraph 76 of the Complaint are DENIED.

77. The allegations contained in Paragraph 77 of the Complaint are DENIED.

78. The allegations contained in Paragraph 78 of the Complaint are DENIED.

COUNT IV – CONVERSION OF PROPERTY

79. The allegations contained in Paragraph 79 of the Complaint are DENIED. Jack Andrews was given credit for $270,000, representing the value of improvements made under the Ground Lease as of a certain date.

80. The allegations contained in Paragraph 80 of the Complaint are DENIED. Jack Andrews and David Talton were given credit for $800,000, representing the value of additional improvements made under the Ground Lease.

81. The allegations contained in Paragraph 81 of the Complaint are ADMITTED to the extent that it alleges that Andrews and Talton provided value to Ethlyn Hall in the amount of $1,070,000 for the 75 year Ground Lease.

82. The allegations contained in Paragraph 82 of the Complaint are DENIED. The $800,000 was to fund the capital improvements under the 2003 Ground Lease, as those improvements were revised by Phyllis Hall and Ethlyn Hall, and to "satisfy and discharge the obligations of the tenant under the Lease Agreement dated January 25, 2003 between Landlord and ANDREWS ST. JOHN TRUST (the "Prior Lease") and for the cancellation and surrender of the Prior Lease; and in consideration for the granting of this Lease."

83. The allegations contained in Paragraph 83 of the Complaint are ADMITTED.

84. The allegations contained in Paragraph 84 of the Complaint are ADMITTED to the extent it alleges that Ethlyn Hall is the owner of Parcel 17-7, Estate Peter Bay and entitled to the value of the capital improvements she sought.

85. The allegations contained in Paragraph 85 of the Complaint are DENIED.

86. The allegations contained in Paragraph 86 of the Complaint are DENIED.

87. The allegations contained in Paragraph 87 of the Complaint are DENIED.

88. The allegations contained in Paragraph 88 of the Complaint are DENIED.

89. The allegations contained in Paragraph 89 of the Complaint are ADMITTED to the extent that it alleges Defendant Hall acted as Ethlyn Hall's attorney for over 20 years.

90. The allegations contained in Paragraph 90 of the Complaint are DENIED.

91. The allegations contained in Paragraph 91 of the Complaint are DENIED.

92. The allegations contained in Paragraph 92 of the Complaint are ADMITTED to the extent that it alleges that Ethlyn Hall was entitled to a copy of her files upon request.

93. The allegations contained in Paragraph 93 of the Complaint are DENIED.

94. The allegations contained in Paragraph 94 of the Complaint are DENIED.

95. The allegations contained in Paragraph 95 of the Complaint are DENIED.

96. The allegations contained in Paragraph 96 of the Complaint are DENIED.

97. The allegations contained in Paragraph 97 of the Complaint are DENIED.

98. The allegations contained in Paragraph 98 of the Complaint are DENIED.

99. The allegations contained in Paragraph 99 of the Complaint are DENIED.

100. The allegations contained in Paragraph 100 of the Complaint are DENIED.

101. The allegations contained in Paragraph 101 of the Complaint are DENIED.

102. The allegations contained in Paragraph 102 of the Complaint are ADMITTED as to advice Defendant Hall gave his mother and on which she justifiably relied, and are DENIED as to Ethlyn Hall being instructed to sign any documents.

103. The allegations contained in Paragraph 103 of the Complaint are DENIED.

104. The allegations contained in Paragraph 104 of the Complaint are DENIED as to fraud or any damages arising therefrom or the diversion of any funds. The capital improvements are located at Parcels 17-4, 17-5 and 17-6 and are evident to see.

105. The allegations contained in Paragraph 105 of the Complaint are DENIED.

106. The allegations contained in Paragraph 106 of the Complaint are DENIED.

COUNT VII – UNJUST ENRICHMENT

107. The allegations contained in Paragraph 107 of the Complaint are DENIED.

108. The allegations contained in Paragraph 108 of the Complaint are DENIED.

109. The allegations contained in Paragraph 109 of the Complaint are DENIED.

110. The allegations contained in Paragraph 110 of the Complaint are DENIED.

111. The allegations contained in Paragraph 111 of the Complaint are DENIED.

COUNT VIII – ACCOUNTING

112. The allegations contained in Paragraph 112 of the Complaint are DENIED.

113. The allegations contained in Paragraph 113 of the Complaint are DENIED.

114. The allegations contained in Paragraph 114 of the Complaint are DENIED.

115. The allegations contained in Paragraph 115 of the Complaint are DENIED.

116. The allegations contained in Paragraph 116 of the Complaint are DENIED.

117. The allegations contained in Paragraph 117 of the Complaint are DENIED.

118. The allegations contained in Paragraph 118 of the Complaint are DENIED.

119. The allegations contained in Paragraph 119 of the Complaint are DENIED.

120. The allegations contained in Paragraph 120 of the Complaint are DENIED.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim for which relief can be granted.

2. The Complaint is barred by the statute of limitations.

3. The Trust lacks standing to bring a claim against Defendants.

4. The alleged claims of Ethlyn Hall do not survive her death.

5. The alleged claims of Ethlyn Hall cannot be assigned to the Trust.

6. The Trust and other documents signed by Ethlyn Hall after August 2010 were signed while she was subject to undue influence by Elsa Hall and others and are therefore invalid.

7. The Plaintiff's claims are barred by the doctrine of unclean hands.

8. Defendant Samuel Hall reserves the right to assert additional affirmative defenses based on information obtained in the case, including Plaintiff's overdue initial Rule26 discovery, which has not yet been obtained.

COUNTERCLAIM

Defendant Samuel H. Hall, Jr., by and through his undersigned counsel, as and for his counterclaim alleges as follows:

1. This Court has diversity jurisdiction pursuant to 28 U.S.C. Section 1333.

2. Defendant Samuel H. Hall, Jr. ("Samuel Hall") is a citizen of the Virgin Islands, residing in St. Thomas, U.S. Virgin Islands, and is the son of Ethlyn Hall.

3. Yassin Hall, is a citizen of Florida and is the granddaughter of Ethlyn Hall and the only child of Victor Hall, son of Ethlyn Hall.

4. Phyllis Hall-Brin, is a citizen of the Virgin Islands, residing at # 156-157 Estate Enighed and Contant, Cruz Bay, St. John, Virgin Islands, and is the daughter of Ethlyn Hall.

5. Plaintiff Elsa Hall, is a citizen of Florida and is the daughter of Ethlyn Hall.

6. Elsa Hall is named herein individually and in her purported capacity as a trustee of the Trust.

7. Tanya Muldrow is a citizen of the state of Georgia and is the daughter of Phyllis Hall-Brin.

8. Ethlyn Hall ("Ethlyn Hall") was a citizen of the Virgin Islands at the time of her death and is the mother of the Samuel H. Hall, Jr., Phyllis Hall-Brin and Elsa Hall, and the

grandmother of Yassin Hall and Tanya Muldrow.

9. She died on May 5, 2012 in Miami, Florida.

10. Ethlyn Hall was moved out of her home at No. 16 Peter Bay, St. John, and eventually to Miami, Florida at a time when she was mentally unable to make an informed decision about her domicile or care due to the undue influence of Elsa Hall.

11. In 1975, Estate Peter Bay, St. John was partitioned into 1/6th shares. Ethlyn Hall received approximately eight acres as a result of the partition.

12. Ethlyn Hall received from the partition approximately 1.5 acres in lower Peter Bay (Parcel 16) and approximately six acres in Upper Peter Bay (Parcel 17).

13. Ethlyn Hall's Peter Bay property was in addition to the Cruz Bay property she and Samuel Hall, Sr. owned, known as Parcel No. 156-157 Estate Enighed and Contant.

14. For over 30 years, starting in the 1970's, Samuel Hall provided legal and other assistance for Ethlyn Hall without seeking or obtaining any compensation or remuneration in the form of money or property.

15. In 1970's, when Samuel Hall, Sr. and Ethlyn Hall divorced, Samuel Hall was designated by their divorce court judge, in accordance with the agreement of his mother and father, to oversee the allocation of net rental income

from their Cruz Bay property between them, and he did so voluntarily and without any financial compensation or remuneration.

16. In 1981, when Samuel Hall, Sr. agreed to sell his one-half interest in the Cruz Bay property to Ethlyn Hall, Samuel Hall cosigned the bank loan of Ethlyn Hall allowing her to purchase his one-half interest.

17. During the 1980-1990's, St. John Land Investment Limited sought to collect from Ethlyn Hall 1/6th the cost of constructing a concrete subdivision road with underground utilities, security gate and gate openers, roadside stonework and landscaping in lower Peter Bay.

18. The cost of said work was several hundred thousand dollars if it was not in excess of $1 million.

19. Through the legal efforts of Defendant Samuel Hall, Ethlyn Hall did not have to pay for any of the cost of the roadwork.

20. Samuel Hall, on behalf of Ethlyn Hall was successful in discouraging St. John Land Investment from attempting to collect from her 1/6th of the cost of the work.

21. If Ethlyn Hall had been forced to pay 1/6th the cost of the work, she would have been forced to sell some of her property in order to do so.

22. In the 1980's, Samuel Hall assisted his mother in the construction of her house at

Parcel 16 by providing her with construction materials and equipment from St. Thomas at no cost to her.

23. In 1990, when Victor Hall attempted to adversely possess his mother's property in lower Peter Bay, Samuel Hall successfully sued to evict Victor Hall on behalf of Ethlyn Hall and successfully defended Ethlyn Hall from his adverse possession claim in the Territorial Court F.E.D. No. 218/1990 and in the District Court App. Div. Misc. No. 1990-18.

24. In 1990, Samuel Hall recommended that Ethlyn Hall place her Cruz Bay property in her name along with that of Elsa Hall and Phyllis Hall as joint tenants in order to provide them with economic security.

25. When Ethlyn Hall asked if he should be included, he declined to be included on the deed.

26. On April 25, 1990, at the recommendation of Samuel Hall, and with his legal assistance in preparing the deed, Ethlyn Hall, conveyed by quitclaim deed her seven dwelling unit guest house doing business as Hillcrest Guest House ("Hillcrest Guest House"), located on Parcel No. 156-157 Estate Contant and Enighed, St. John, to herself, Phyllis and Elsa, as joint tenants, reserving for herself, however, a life estate in all rents and profits.

27. Ethlyn Hall did this in order to provide a home and shelter to Elsa Hall and Phyllis Hall, who had failed to purchase or otherwise

acquire real property or a house of their own, while at the same time preserving her right to the guest house income in case she needed it.

28. Ethlyn Hall also allowed Phyllis Hall-Brin to live at the Hillcrest Guest House in a three bedroom apartment rent-free since April 25, 1990 on condition that she manage the rental of the guest house and provide her with the net income.

29. However, after the conveyance, Phyllis Hall-Brin failed to continue to provide her mother with her portion of the net income. Instead, except for paying the telephone and light bill for her mother's home at No. 16 Estate Peter Bay, Phyllis Hall Brin kept the net income for her own use.

30. Ethlyn Hall complained about Hall-Brin's actions in converting the rental income from the Hillcrest Guest House to her own personal use.

31. In 1999, Elsa Hall asked her mother to convey to her property in Estate Peter Bay, St. John.

32. In June 1999, after her mother agreed to give Elsa Hall one acre, Samuel Hall prepared a quit-claim deed at the request of his mother, in order to cause Elsa Hall to quit-claim her interest in the seven dwelling unit guest house (Hillcrest Guest House), and to receive in exchange a deed of gift from Ethlyn Louise

Hall to approximately an acre in Estate Peter Bay.

33. By deed dated June 4, 1999, Elsa Hall quitclaimed to Ethlyn Hall and Phyllis Hall Brin her interest in the Hillcrest Guest House.

34. After obtaining the acre, Elsa Hall was unsuccessful in operating a landscaping business on the property, and eventually discontinued the landscaping business.

35. She was also unsuccessful in operating a campground on the property

36. She has also been unsuccessful in remaining gainfully employed by others for any significant length of time.

37. In 1999, Elsa Hall also asked Samuel Hall to incorporate a business she called Botanical Villas, Inc. in order to operate a campground on her property, and he incorporated it for her at no cost to her for his services.

38. Elsa Hall also asked Samuel Hall to co-sign a truck loan for her and he did that too.

39. However, the buildings Elsa Hall built on her property were plywood shanties, not botanical villas, and were not [] kept clean and safe.

40. This caused them to receive highly unfavorable guest reviews, which appear online at www.tripadvisor.com when a search for "St. John Botanical Villas" is conducted.

41. In 1999, in exchange for the deed to one acre, Elsa Hall quit-claimed and relinquished her interest in the Hillcrest Guest House in order to obtain the first of two adjacent acres of land she received from her mother in Estate Peter Bay, St. John.

42. In 1990, St. John Land investment Limited desired to construct a concrete subdivision road, stonework, landscaping, security gate and gate opener in Upper Peter Bay, with the road work to be done in the location established by the 1975 partition decree pursuant to which Ethlyn Hall obtained titleto her Peter Bay property.

43. Instead of seeking to have Ethlyn Hall pay 1/6th of the cost, St. John Land Investment, Ltd. agreed, in exchange for Samuel Hall on behalf of Ethlyn Hall obtaining the CZM permits to build the concrete road, stone walls, and landscaping, to perform the roadwork without requiring Ethlyn Hall to pay 1/6th of its cost.

44. If Ethlyn Hall had been forced to pay 1/6th the cost of the work, she would have been forced, as a retiree, to sell some of her property in order to do so.

45. The cost of said roadwork was several hundred thousand dollars if it was not in excess of $1 million.

46. Samuel Hall also retained the services of architect John Woods to design the subdivision

road in Upper Peter Bay and paid for the architectural services himself.

47. On December 13, 1999, Samuel Hall applied for minor CZM permit on behalf of his mother to construct portion of Subdivision road in Upper Peter Bay pursuant to a power of attorney from his mother authorizing him to do so.

48. Neither Ethlyn Hall nor any of her children, except for Samuel Hall, or her grandchildren paid for any of the cost of the roadwork in Upper Peter Bay.

49. On November 17, 2000, Samuel Hall applied for another CZM permit on behalf of Ethlyn Hall in order to permit to construct another portion of the subdivision road in Upper Peter Bay, pursuant to a power of attorney given to him by Ethlyn Hall.

50. The roadwork cost hundreds of thousands of dollars if not more than $1 million.

51. Through the efforts of Samuel Hall, Ethlyn Hall paid none of the cost of the roadwork.

52. In addition, in 2001, Samuel Hall, on behalf of Ethlyn Hall, also arranged for the exchange of easements and of substandard parcels owned by Ethlyn Hall (Parcel 17-B and 17-3) for a larger, substandard parcel owned by St. John Land Investment (Parcel 15-7), so that each party obtained a substandard parcel that, when added to their remaining property, enhanced its value. In addition, the substandard parcel Ethlyn Hall received was

larger and more valuable than the substandard parcels she gave up in exchange.

53. Ethlyn Hall also obtained from St. John Land Investment, Ltd. at no cost to her, through the assistance of Samuel Hall, a contractual commitment to construct an additional concrete access road to her property, of similar construction as the concrete subdivision road, and the access road was constructed as agreed.

54. In 1998 or 1999, through 2002, Samuel Hall also successfully represented his mother in the case of *Peter Bay Homeowners Association v. Stillman, et. al.*, a lawsuit filed in the District Court of the Virgin Islands, in order to protect Ethlyn Hall from the claim of the Peter Bay Homeowners Association that its members had a 50 foot easement over her beachfront property (Parcel 16) in lower Peter Bay, and from their claim that she was obligated to be a dues-paying member of the Association.

55. In 2002, he also successfully represented his mother on appeal of the case to the U.S. Court of Appeals for the Third Circuit.

56. Starting in 2001, Samuel Hall also assisted Ethlyn Hall in subdividing her property in upper Peter Bay, after the concrete road and other road improvements were completed.

57. He accomplished the subdivision at considerable cost, time and expense to himself,

including paying for the engineering and surveying costs himself.

58. On or before April 2002, with the legal assistance of Samuel Hall, after he completed the subdivision of Parcel 17 after considerable expenditure of his own time, money and effort, Ethlyn Hall conveyed by deed of gift the second of two acres in Estate Peter Bay to Elsa Hall (Parcel 17-2), an acre, more or less, to her daughter Phyllis Hall Brin (Parcel 17-4), an acre, more or less, to her son (Parcel 17-5); and caused the conveyance of an acre, more or less, to her granddaughter, Yassin Hall (Parcel 15-7 and 17-6).

59. Samuel Hall did not seek or obtain a gift of any property from his mother beyond the one acre parcel she decided to give him.

60. In 2002 and 2003, Samuel Hall, on behalf of Ethlyn Hall, without any cost to her, also negotiated with John ("Jack") Andrews a long-term ground lease on a one acre parcel known and described as Parcel No. 17-7 Estate Peter Bay.

61. In exchange for the construction of two cottages, one on the property of Phyllis Hall Brin and one on the property of Yassin Hall, Andrews was to receive a 50 year ground lease to an unimproved acre of land known as Parcel 17-7.

62. On January 24, 2003, the Ground Lease to Parcel 17-7 was executed between Ethlyn

Hall and the Andrews St. John Trust ("Andrews").

63. Samuel Hall did not ask for or seek to obtain any benefit from the Ground Lease he successfully negotiated, or receive any financial compensation or remuneration for conceiving of and successfully negotiating the Ground Lease.

64. Ethlyn Hall greatly appreciated the continued efforts of her son on her behalf and on behalf of the family.

65. Although initially the construction of cottages under the Ground Lease for Elsa Hall and Phyllis Hall-Brin were recommended by Samuel Hall to his mother, Ethlyn Hall, she decided that Elsa Hall had already received enough from her, having been given approximately two acres, one more acre than anyone else, and the two acres were more valuable than one acre with a cottage.

66. Ethlyn Hall decided that the two cottages were to be built by Andrews for Phyllis Hall-Brin and Yassin Hall, the only child of Ethlyn Hall's deceased son, Victor Hall, on their respective parcels.

67. On March 2003, Andrews made a separate proposal to Elsa Hall to develop her property and build cottages on her property but she rejected it.

68. After the Ground Lease was executed, Elsa Hall insisted to her mother that she should get a cottage and eventually caused her

mother to request from Samuel Hall by letter dated April 23, 2003, that she be provided with a cottage, which would have required amending the Ground Lease and extending its term.

69. However, Andrews was not agreeable to amending the Ground Lease to extend its term in order to build a third cottage.

70. Elsa Hall became upset with Samuel Hall for not obtaining for her a cottage free of cost to her under the Ground Lease and stopped speaking to him in 2003.

71. Elsa Hall then listed her property for rent under a long-term lease but was unable on her own to obtain a tenant.

72. Subsequently, Elsa Hall listed her property for sale, but was unable to obtain a buyer until June 2012, approximately one month after her mother passed away, and she sold it at a significantly reduced price.

73. Elsa Hall has continually exploited her mother's resources for her own care. In fact, she attempted unsuccessfully, after Ethlyn Hall had died on May 5, 2012, but before she was buried on May 26, 2012, to remove the lis pendens Samuel Hall placed on the property of Ethlyn Hall in 2011 in order to protect it from Elsa Hall and the Trust, while he sought the appointment of a guardian for his mother.

74. Elsa Hall was then forced to sell her own property within days after the passing of her

mother, because she could no longer rely on her mother's income for support.

75. Ethlyn Hall was born on June 6, 1916 in St. John, Virgin Islands and died on May 5, 2012 and was 95 years old at the time of her death.

76. Prior to August 11, 2010, Ethlyn Hall lived in her two story, two dwelling unit, beachfront home located at No. 16 Peter Bay, St. John, Virgin Islands.

77. Prior to August 11, 2010, Ethlyn Hall was looked after by Samuel Hall and he provided her with assistance besides legal assistance over a period of many years.

78. He took her to the doctor, the St. John clinic, St. Thomas hospital and other places, bought her groceries, cleaned her yard, fixed her driveway, installed fans in her house, maintained her home, bought her appliances, built her a storage shed, picked up her mail, made her bank deposits, obtained for her direct deposit of her retirement income, saw to her medical care and also represented her in lawsuits and assisted her in subdividing, leasing, conveying and distributing her real property in accordance with her wishes.

79. Prior to August 11, 2010, Elsa Hall did not provide for the care of Ethlyn Hall, despite her mother's generosity towards her. Instead, she depleted her resources by spending her money, eating her food, occupying her residence and requested and obtained funds

from her to live, repair her truck and to travel to and from Florida.

80. Whenever Elsa Hall was in St. John, she lived in the home of Ethlyn Hall, slept on her couch, ate her food, and sometimes occupied her downstairs apartment.

81. Elsa Hall also rented out the downstairs apartment of Ethlyn Hall on a short-term basis, from time to time, in order to obtain income for herself.

82. On or about August 11, 2010, Elsa Hall removed Ethlyn Hall from her home at No. 16 Peter Bay in order to isolate her from Samuel Hall and Yassin Hall.

83. On or about August 11, 2010, Samuel Hall and Yassin Hall went to the home of Ethlyn Hall and found it vacant and devoid of her personal effects, and did not know where she was or whether she had passed away.

84. When Ethlyn Hall was moved into a unit in the Hillcrest Guest House inCruz Bay in August 2010, Elsa Hall moved in with her and slept in her apartment, ate her food and spent her money. She also depleted her savings.

85. After August 11, 2010, Elsa Hall rented out her mother's two dwelling unit home at No. 16 Peter Bay. Upon information and belief, the income derived from the rental of Ethlyn Hall's two dwelling unit home at No. 16 Peter Bay was not utilized exclusively for Ethlyn Hall's benefit.

86. Thereafter, she moved her mother to Miami, Florida without the prior knowledge of Samuel Hall or Yassin Hall and concealed from them her telephone number, address and whereabouts until the day Ethlyn Hall died.

87. In Miami, Elsa Hall continued to live off of the income and assets of Ethlyn Hall until the day she died.

88. Phyllis Hall-Brin, after benefiting from the love of Ethlyn Hall turned her back on her mother after she received: (a) a half interest in the Hillcrest Guest House in which she has lived rent free since 1990 and from which she has kept rental income to which Ethlyn Hall is entitled; (b) a one acre parcel of land in Estate Peter Bay known and described as Parcel 17-4 Peter Bay; and (c) the right to have a cottage built by Andrews on her Parcel 17-4.

89. Phyllis Hall-Brin turned away from her mother just as or shortly after construction began on her cottage in early 2006.

90. On October 13, 2006, after Phyllis Hall Brin continued to neglect her mother, Samuel Hall sent an email to her and several other members of the family requesting that they provide Ethlyn Hall with attention, care and assistance.

91. Despite receipt of that communication, Phyllis Hall Brin continued to keep her mother's income from Hillcrest House, ignore her care and welfare, and failed to allow her to use a

dwelling unit in the Hillcrest Guest House. For a long period of time she did not communicate with her mother, including on Christmas, Thanksgiving, Valentine's Day, Easter, or her birthday.

92. Phyllis Hall Brin also stopped speaking to Samuel Hall and his wife after she was urged as the only child of Ethlyn Hall who at the time resided on St. John full-time, to look out for her mother's well-being and care.

93. Phyllis Hall-Brin, who is retired and lives on St. John, did not even show up when EMTs called her about her mother's illness after her mother had called for an ambulance. The EMTs waited with Ethlyn Hall at her home until Samuel Hall and his wife arrived on St. John from St. Thomas.

94. On another occasion, while Samuel Hall was on the U.S. Mainland in May 2009, Phyllis Hall Brin refused to pick up her mother at the St. John clinic until she was told by the clinic staff that her mother had to be released to a family member not to the non-family member Samuel Hall arranged from the mainland to pick her up.

95. On March 5, 2007, by email, Samuel Hall reminded Phyllis Hall-Brin, even as her mother's Ground Lease was funding the construction of her cottage, of the need for her to contact and communicate with her mother. He informed her by email that all her mother needed is a once-a-week phone call for just 15 minutes.

96. Notwithstanding this reminder, the continued generosity of her mother and her mother's forbearance from seeking more aggressive measures to ensure that Phyllis Hall Brin turned over to her the rental income that was due to her, Hall Brin continued to ignore the welfare of her mother, and failed to visit her or call her once-a-week.

97. She did not visit her mother, assist her in obtaining groceries, return her phone calls or otherwise honor her mother.

98. Thus, on and before August 3, 2007, Ethlyn Hall decided to discontinue funding a cottage for Phyllis Hall Brin, who was not taking care of her, and decided instead to reprogram the funds towards construction of the house of Samuel Hall, who was taking care of her.

99. On August 3, 2007, Ethlyn Hall voluntarily signed a statement addressed to whom it may concern, with full knowledge of what she was doing, reprogramming the funds under the Ground Lease from the property of Phyllis Hall to the property of Samuel Hall, while authorizing him to complete the construction on the property of Yassin Hall.

100. On August 4, 2007 she signed a Power of Attorney and an Assignment, giving him complete authority over the Ground Lease in order to successfully complete the construction of the house of Yassin Hall and to assist in the completion of his own house, and to see to the future development of Parcel 17-7, which he did.

101. In August 2007, Ethlyn Hall was pleased that her son had taken care of her through the years and was willing to continue to take care of her in the future and undertake the completion of the home of Yassin Hall.

102. Ethlyn Hall, at the time she signed those documents, was pleased that she was able to assist her son financially, for the first time since he graduated from law school in 1975 instead of the other way around.

103. In 2004, Samuel Hall began construction with his own funds of his own home in St. John on the property given to him by his mother in 2002. At the time he began construction of his home, and until Phyllis Hall failed to look after their mother, he never sought or obtained any financial assistance from Ethlyn Hall to complete his home on Parcel 17-5.

104. Prior to August 3, 2007, Samuel Hall was not a beneficiary of the Ground Lease he successfully negotiated on behalf of his mother with Andrews for the benefit of Phyllis Hall-Brin and Plaintiff Yassin Hall.

105. He became a beneficiary only after his sister failed for a long period of time to honor her elderly mother, and converted substantial rental proceeds due to her mother from the Hillcrest Guest House for Hall-Brin's own personal use and benefit.

106. For a period of almost two years thereafter the reprogramming of the funds from the

Ground Lease, Phyllis Hall Brin continued to ignore her mother's welfare, and avoided communicating with Samuel Hall.

107. Then on June 8, 2009, Phyllis Hall Brin wrote an email accusing Samuel Hall of failing to see to the construction of her cottage.

108. In response, Samuel Hall chastised her in a reply email for not taking care of her mother, ignoring her at Christmas, birthdays and other holidays, and confirmed why, due to her neglect of her mother, her cottage's construction was halted back in 2007.

109. Phyllis Hall Brin never responded to the email of Samuel Hall. Instead, she sought unsuccessfully to have her mother reprogram funds back to the construction of her cottage, which her mother refused to do.

110. Phyllis Hall Brin continued to keep the rent from the seven dwelling units at Hillcrest Guest House to which her mother was legally entitled.

111. Even as her mother deteriorated physically and mentally, she continued to keep her rental income, and ignore her needs.

112. In March 2010, Ethlyn Hall complained to her son, Samuel Hall that Phyllis Hall would not let her stay in an apartment in the Hillcrest Guest House, was stealing her money and was coming into her home at night and had stolen her Bible.

113. On March 22, 2010, Ethlyn Hall asked her son to prepare a letter for her signature asking Phyllis Hall-Brin, beginning with the month of April, to send her a written monthly report of revenues and expenses along with a check for 50% of the net income by the 15th of the following month and on the 15th day of each month thereafter.

114. Phyllis Hall-Brin never responded to the March 22, 2010 letter from her mother.

115. Phyllis Hall-Brin failed to provide Ethlyn Hall with any written monthly reports from the operations at the Hillcrest Guest House. Instead, she continued to keep her mother's income.

116. Over a period of years, Phyllis Hall Brin and Elsa Hall have depleted their mother's savings and resources without materially helping to improve her lot in life or provide for her care and comfort.

117. Elsa Hall represented to her mother that she needed money for various things and constantly asked her to send her money while she was living in Florida. She also asked her to sign social security documents in blank so she could obtain disability benefits.

118. Her mother also provided funds for Elsa to improve her property, and on occasion gave her the rent from her downstairs apartment at No. 16 Peter Bay or its furnishings for her use or for the use of guests of her Botanical Villas.

119. As long as Ethlyn Hall was physically healthy and mentally sound, she was able to keep Elsa Hall and Phyllis Hall at bay. However, as she got older, she began to physically and mentally deteriorate and become paranoid. Ethlyn Hall was frail, infirm and of failing mind and body due to her advanced age and health. She was not capable of making decisions concerning her affairs because of failing memory, dementia and paranoia and the ease with which she may be unduly influenced.

120. In late 2009, she began to imagine people coming into her house in the middle of the night, including Phyllis Hall, to steal her Bible, steal her money and take her property.

121. In 2010, she complained repeatedly to her son, Samuel Hall, that she was not right in the head.

122. Sometimes she would sleep in a chair by the door at night with a string around the doorknob to keep out intruders.

123. Sometimes she would ask to sleep in Samuel Hall's home in St. John and did so on occasion in order to feel safe. Sometimes she also stayed during the week in his house on St. Thomas, where he encouraged her to stay during the week, but she frequently declined to do so.

124. In August 2010, Ethlyn Hall was no longer able, physically and mentally, to keep Elsa Hall and Phyllis Hall at bay. As a result, they

were able to move her out of her home at No. 16 Peter Bay on the pretense that they were going to paint it and return her to it. Instead, they took her furniture for their own purposes and rented out her house from under her for their own purposes.

125. Elsa Hall and Phyllis Hall put Ethlyn Hall in a dwelling unit in the guest house that Phyllis Hall Brin had long denied her access to and continued to keep her rent from the remaining units.

126. Elsa Hall and Phyllis Hall caused her to sleep on a futon instead of in her own queen size mahogany bed.

127. Elsa Hall and Phyllis Hall also duped Ethlyn Hall into thinking that she no longer had a place to stay in St. John.

128. In order to accomplish their objectives, Elsa Hall, Phyllis Hall and Tanya Muldrow conspired to isolate their mother from her son, Samuel Hall, and her granddaughter, Yassin Hall, and others.

129. In August 2010, Elsa Hall and Phyllis Hall took Ethlyn Hall, from her home at No. 16 Peter Bay without the knowledge or consent of Samuel Hall and Yassin Hall.

130. Within days after moving her mother out of her home, Elsa Hall posted her house for rent on her Botanical Villas website.

131. In August 2010, Samuel Hall and Yassin Hall traveled to No. 16 Peter Bay in order to

let Ethlyn Hall know that Yassin Hall was returning to Florida and discovered that the home of Ethlyn Hall had been stripped of furniture, and other contents and all of her personal effects.

132. Samuel Hall and Yassin Hall also discovered on that day that the downstairs apartment of Ethlyn Hall had been rented out by Elsa Hall to two University of the Virgin Islands students.

133. Elsa Hall also took the storage shed of Ethlyn Hall on Parcel 16 that Samuel Hall had built for her, and moved the shed onto the beach and attempted to rent it out as living accommodations without amenities such as running water, electricity, toilet facilities, certificate of occupancy or CZM approval.

134. Elsa Hall and Phyllis Hall also made it difficult for Samuel Hall to locate and speak with his mother. Without his knowledge, they moved her into one of her apartments in the Hillcrest Guest House where she had been previously denied access by Phyllis Hall-Brin. They located her in an apartment behind a cyclone fence, which was inaccessible by visitors without encountering Rottweilers of Phyllis Hall-Brin.

135. Then Elsa Hall wrote letters to Samuel Hall which she caused his mother to sign without her understanding or appreciating their significance, demanding money and making assertions Elsa Hall knew to be false.

136. No such letters or demands for money were ever written or sent to Samuel Hall by his mother prior to Elsa Hall and others moving her out of her home in August 2010, where she was not isolated from anyone.

137. Elsa Hall and Phyllis Hall caused their mother to reject $4,767.42 sent to her by Samuel Hall, made payable to the Virgin Islands Bureau of Internal Revenue, to help pay her property taxes after she had requested the money from him in a telephone call. Instead, they wanted the check made out to her so that they could get her to endorse it and then spend it for their own benefit.

138. In addition to sending Samuel Hall letters purporting to be from his mother, Elsa Hall created an email address through which she sent email to Samuel Hall purporting to be from Ethlyn Hall.

139. The email address Elsa Hall created purporting to be Ethlyn Hall is the email address ethlynhall@yahoo.com.

140. Elsa Hall created this email address, not Ethlyn Hall, because Samuel Hall's 95 year old mother could not type, did not know how to use a computer, create an email address or send email.

141. In August 2010, Elsa Hall and Phyllis Hall grabbed their mother from her home in which she had lived for over 20 years, isolated her from Samuel Hall and Yassin Hall

and by November 2010 caused her to transfer her property into a Trust for such purposes as they wished.

142. They did this without the knowledge or consent of Samuel Hall or Yassin Hall.

143. Prior to creation of the Trust, Ethlyn Hall owned and lived in her home Parcel No.16 Estate Peter Bay, St. John.

144. Prior to the creation of the Trust, she owned Parcel No. 17-7 Estate Peter Bay.

145. In November 2010, three months after Ethlyn Hall was isolated from her son and Yassin Hall, and without their knowledge or consent, Elsa Hall, Phyllis Hall and Tanya Muldrow caused the creation of the Trust into which they caused Ethlyn Hall, through the exercise of undue influence, to transfer her assets in order to benefit individuals they wished to benefit.

146. At the time the Trust was executed by Ethlyn Hall, Elsa Hall enjoyed a confidential relationship with Ethlyn Hall.

147. On April 22, 2011, Samuel Hall first learned of the Trust when he received from Attorney Andrew Simpson a draft of the complaint he proposed to file.

148. Elsa Hall subsequently continued to conceal the whereabouts of Ethlyn Hall from Samuel Hall and Yassin Hall.

149. Elsa Hall never disclosed to him or Yassin Hall before she moved Ethlyn Hall to Florida

that she had arranged for Ethlyn Hall to execute the Trust.

150. After the death of Victor Hall, Ethlyn Hall's youngest son, in an ongoing effort to isolate her from Samuel Hall, Yassin Hall and others, Elsa Hall also caused Ethlyn Hall to faint in March 2011 by moving her into plywood shanties that exist without modern amenities at Botanical Villas, the property owned by Elsa Hall, causing her to need medical care at the St. John clinic.

151. As a result of the efforts of Elsa Hall, Phyllis Hall Brin and Tanya Muldrow to deny him access to his mother, the last time Samuel Hall saw and spoke to his mother before she died on May 5, 2012 was at the St. John Clinic in March 2011.

152. After learning his mother was in the Myrah Keating Smith Clinic in St. John, Samuel Hall immediately went to the clinic along with his wife to see his mother.

153. At the clinic, he talked with his mother about the passing of his brother; whether his brother suffered from the same illnesses as his father, and her need to eat whether she felt like it or not.

154. As always, Ethlyn Hall, whenever she saw Samuel Hall, was happy to see him and never raised any issues with him concerning his care of her, the Ground Lease, or the construction of improvements on his parcel or

that of Yassin Hall, or any other matter relating to property or assistance.

155. Ethlyn Hall was also happy to see Diana Hall, the wife of Defendant Hall, who had been like a daughter to her, took care of her and Ethlyn Hall never raised any issues with her at the hospital.

156. The last time Samuel Hall saw his mother alive was at the Myrah Keating Smith Clinic in St. John.

157. In early April 2011, Elsa Hall prevented Yassin Hall from visiting her grandmother while she was on St. John for the funeral of her father, Victor Hall.

158. Elsa Hall hid Ethlyn Hall from Yassin Hall because she was afraid that Yassin would learn of the creation of the Trust in November 2010, and the exploitation of her resources, and of the plans to move Ethlyn Hall to Florida.

159. As a result of the efforts of Elsa Hall, Yassin Hall never saw or spoke to her grandmother again.

160. Yassin Hall did not even see Ethlyn Hall at the funeral of her father, Victor Hall, because Elsa Hall did not allow Ethlyn Hall to attend the funeral and actively sought to prevent Yassin Hall from visiting her mother while in St. John for her father's funeral.

161. Yassin Hall was denied the opportunity to see and speak to her grandmother in person

in August 2010, April 2011 and again in October 2011.

162. Not only did Elsa Hall and Phyllis Hall Brin not attend the funeral of their brother, Victor Hall, in April 2011, or assist in the cost of his burial, they kept Ethlyn Hall from the funeral services for her son, which was held in St. John on April 4, 2011.

163. Nor did Elsa Hall or Phyllis Hall Brin attend the funeral of Ethlyn Hall on May 26, 2012, which was also held on St. John, or assist in paying for the cost of her burial or the construction of her vault.

164. Phyllis Hall Brin lives in St. John just up the hill from the Lutheran Church where the funeral services for Ethlyn Hall were held.

165. In May 2011, after they moved Ethlyn Hall to Florida, Elsa Hall took advantage of Ethlyn Hall's failing memory, dementia and paranoia and used her undue influence over her and caused her to authorize this lawsuit against Samuel Hall.

166. Elsa Hall found Andrew Simpson, the lawyer who filed this suit, and arranged for him to meet with Ethlyn Hall.

167. At the time this lawsuit was filed, Elsa Hall enjoyed a confidential relationship with Ethlyn Hall.

168. From April 2011 until May 5, 2012, Ethlyn Hall lived in Miami, hidden from Yassin Hall and Elsa Hall until the day she died.

169. Due to her mental and physical infirmity, she could not walk or otherwise leave her apartment or contact Samuel Hall or Yassin Hall.

170. Before she died, Elsa Hall also caused Ethlyn Hall to execute a Last Will and Testament on June 3, 2011, giving all of her rest [sic] to the Trust, and appointing Elsa Hall and appointing her Personal Representative under the Will.

171. Elsa Hall lived with Ethlyn Hall at the time the Will was signed by Ethlyn Hall, in the same Miami dwelling as Ethlyn Hall, relied on the income from Ethlyn Hall for her own existence, and utilized the resources of Ethlyn Hall as she saw fit.

172. At the time the Will was executed by Ethlyn Hall, Elsa Hall enjoyed a confidential relationship with Ethlyn Hall.

173. Defendant Hall first learned of the Will on or about January 21, 2013, when he received the motion for leave to amend the complaint and the proposed First Amended Complaint filed in this action (Doc. Nos. 32 and 33).

174. Ethlyn Hall lacked the mental capacity to change her domicile from the Virgin Islands to Florida, or to sign the Trust or the Will.

175. Defendant Hall also learned for the first time from paragraph 12 the proposed amended complaint that Elsa Hall filed a probate action in Miami to probate the will in Florida.

176. Elsa Hall never gave to Defendant Hall or to Yassin Hall, as the heirs at law and next of kin of Ethlyn Hall, notice of her efforts to probate the Will.

177. Had Defendant Hall not challenged the survivability and assignability of tort claims of Ethlyn Hall to the Trust, the proposed First Amended Complaint would not have been filed and he would never have been informed by Elsa Hall of the existence of the Will or the effort by Elsa Hall to probate the Will in Florida.

178. Elsa Hall also asked others to conceal from Samuel Hall the existence of the Trust and the Will, and the whereabouts of Ethlyn Hall.

179. Yassin Hall resides in Florida, where her grandmother Ethlyn Hall was taken, but Elsa Hall, Phyllis Hall Brin and Tanya Muldrow failed to notify her of her grandmother's whereabouts in Miami and prevented Yassin Hall from having any contact with her grandmother even though both were located in Florida.

180. After a guardianship action was filed in the Family Court in St.Thomas in April 2011 by Yassin Hall and Samuel Hall, seeking the appointment of a guardian for Ethlyn Hall, Elsa Hall and Phyllis Hall Brin opposed the appointment of a guardian.

181. On October 5, 2011, Yassin Hall appeared in the Family Court and learned from the

Family Court judge exactly where her grandmother was being kept in Miami by Elsa Hall.

182. On October 5, 2011, after appearing in Family Court in St. Thomas and after discovering in Family Court where her grandmother was being kept in Miami by Elsa Hall, Yassin Hall travelled to Miami on October 5, 2011 and attempted to see her grandmother but Elsa Hall prevented her from doing so by refusing to open the apartment door of the apartment of Ethlyn Hall.

183. On October 5, 2011, in the presence of witnesses, Elsa Hall refused to open the door to Ethlyn Hall's apartment to let Yassin Hall see or speak to her invalid grandmother.

184. On October 5, 2011, Elsa Hall also called the police to arrest Yassin Hall rather than let her see her grandmother, but they declined to arrest her.

185. Since April 2011, and until she passed away on May 5, 2012, Defendant Samuel Hall and Yassin Hall were denied the ability to call Ethlyn Hall, visit her, wish her Happy Birthday or Happy Mother's Day or to determine whether she was properly being cared for. However, Elsa Hall, Phyllis Hall and Tanya Muldrow knew exactly where she was being kept and how to reach her.

186. Elsa Hall also failed to timely notify Samuel Hall and Yassin Hall of the death of Ethlyn

Hall, leaving it to them to be notified by a friend who discovered it on Facebook.

187. Elsa Hall also attempted to deny Samuel Hall and Yassin Hall any involvement in the burial arrangements for Ethlyn Hall even though Elsa Hall and PhyllisHall Brin had no intention of attending and did not attend her funeral.

188. After Samuel Hall learned of the death of Ethlyn Hall, and offered Tanya Muldrow financial assistance with the burial costs, Tanya Muldrow threatened to cremate the remains of Ethlyn Hall unless Samuel Hall also paid for a burial vault for Ethlyn Hall, after he had already paid the funeral home for its services.

189. That threat was made for solely for the purpose of intentionally causing him emotional distress, and to permit Elsa Hall, Phyllis Hall Brin and Tanya Muldrow to avoid paying any of the burial costs of Ethlyn Hall.

190. Elsa Hall individually and as a Trustee of the Trust plotted and planned and conspired to exercise dominion, control and ownership of Ethlyn Hall and her assets and her remains after using her undue influence on her while she was alive, and after isolating her while she was physically and mentally deteriorating, and incapable of taking care of herself and her affairs.

191. Elsa Hall was not motivated by love for Ethlyn Hall but by greed.

192. Elsa Hall and Phyllis Hall did not provide for the care of Ethlyn Hall prior to grabbing her and taking her out of her home in August 2010 just as they did not provide, attend to, care for, or honor their father during the last years of his life until he died in 2004,or provide for Ethlyn Hall after they took her out of her home in August 2010, except out of her own funds and income.

193. Elsa Hall and Phyllis Hall took advantage of Ethlyn Hall for their own economic benefit.

194. Purporting to act in the name of Ethlyn Hall, they attempted to obtain the construction funds under the Ground Lease which were allocated by Ethlyn Hall to the improvements to be made to Parcel 17-5 belonging to Samuel Hall and Parcel 17-6 belonging to Yassin Hall.

195. Notwithstanding their attempts, the dwellings on Parcel 17-5 and 17-6 were successfully completed in 2010 and 2011.

196. At all material times, Elsa Hall and others combined, conspired and acted in concert to remove Ethlyn Hall from her home, isolate her from others, take advantage of her mental and physical deterioration, destroy her relationship with Samuel Hall and Yassin Hall and the children of Yassin Hall and deprive her of her property, to the detriment of Samuel Hall, Yassin Hall and the children of Yassin Hall, grandchildren of Ethlyn Hall, namely, Marik Young, Yamisha Young, Aubrey Warner, Jr., and Roumell Augustine.

COUNT I

BREACH OF FIDUCIARY DUTY

197. After taking advantage of Ethlyn Hall for years, on or after August 2010, Elsa Hall and others used their confidential relationship with Ethlyn Hall to exercise undue influence over her and take advantage of her, especially after she mentally and physically declined and then isolated her from the rest of her family and friends at a time when she could not walk, cook for herself, grocery shop, remember telephone numbers, or take care of herself or manage her own funds, and thus became increasingly dependent on the assistance of others.

198. Because of the physical and mental infirmities of Ethlyn Hall, Elsa Hall and others have been able to take unfair advantage of Ethlyn Hall and to exercise undue influence over her and cause her to sign letters, a deed, Trust, and Will. Elsa Hall individually and as a purported Trustee of the Trust breached the duty of care she owed to her mother.

199. From and after August of 2010, Elsa Hall used and exerted undue influence on her mother while she was in her control, and Elsa Hall was in charge of Ethlyn Hall and the management and distribution of her income and property.

200. Since August 2010, she exercised complete dominion and control over the person of Ethlyn Hall as well as her income and property,

and continues to control her property through the Trust.

201. Elsa Hall and others have failed to account for their stewardship of the welfare, income and property, or for their egregious behavior.

202. As Ethlyn Hall's agent and custodian, Elsa Hall owed her a duty of loyalty and had a fiduciary duty to act in her best interest.

203. Elsa Hall and others breached their fiduciary duty to Ethlyn Hall by:

a. Seeking to take advantage of her dementia and paranoia;

b. presenting documents to her and telling her to sign them knowing that due to her mental infirmity she did not understand them or their legal consequence;

c. Keeping and spending her income for their own benefit;

d. failing to maintain adequate records of all transactions entered into on her behalf;

e. moving her out of her home;

f. causing her to transfer her assets into a Trust for their benefit three months after they moved her out of her home;

g. denying her the opportunity to go to her own son's funeral;

h. moving her to Florida away from the rest of her family and friends;

i. concealing her whereabouts from Samuel Hall, Yassin Hall and other members of her family and her friends;

j. attempting to place and rent out her storage shed on the beach without amenities or CZM approval in violation of law and risk fines and sanctions;

k. depriving her of the love and affection of her son, granddaughter and great-grandchildren.

l. wasting her savings and burial fund.

m. causing Ethlyn Hall to execute a Trust and a Will while she lacked the mental capacity to do as a result of undue influence from Elsa Hall.

204. As a direct and proximate result of her wrongful actions in breach of her fiduciary duty owed to Ethlyn Hall, her mother, and to the rest of her family, Elsa Hall has caused damages and injuries to her mother's estate, and to Samuel Hall, Yassin Hall and other family members.

COUNT II

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

205. All allegations above are incorporated herein by reference as if set forth at length.

206. Elsa Hall and Phyllis Hall-Brin have acted willfully, wrongfully and maliciously to

secret away, confine, and remove from the Virgin Islands, the person of Ethlyn Hall for the purpose of alienating her from Samuel Hall, denying him and Yassin Hall access to their mother and grandmother and otherwise to hold her under their dominion and control all to the detriment of Samuel Hall, Yassin Hall and others.

207. The removal of Ethlyn Hall, from the Virgin Islands, where she was born and has lived most of her life, including all of the past 52 years, was accomplished as a direct combination, plan and scheme of [ ] Elsa Hall and others.

208. Prior to the removal of Ethlyn Hall from the Virgin Islands, the last time she had flown on an airplane was to attend the graduation from law school of Defendant Samuel Hall in 1975.

209. Elsa Hall and Phyllis Hall-Brin, by removing Ethlyn Hall from St. John, Virgin Islands and attempting to establish a new domicile in Florida subjected her person and her estate to potentially substantial tax liabilities for which she and her estate would not otherwise be liable, all to the damage of Ethlyn Hall, her estate, and her heirs.

210. As a person born in the Virgin Islands and resident in the Virgin Islands, Ethlyn Hall's estate would not be subject to federal estate taxes, but that is not true if she is removed from the Virgin Islands and domiciled in Florida.

211. The removal of Ethlyn Hall from the Virgin Islands was accomplished with the motive to control her, isolate her, exert undue influence over her and to otherwise interfere with the relationship she has with Samuel Hall and Yassin Hall.

212. All of the actions of Elsa Hall were calculated to isolate and control Ethlyn Hall, her person and estate, all to the pecuniary advantage of Elsa Hall, and others, in favor of those individuals Elsa Hall wished to benefit, to the detriment of Samuel Hall, Yassin Hall and others.

213. In furtherance of their plan, scheme and design, they combined to overreach and overcome the will of Ethlyn Hall by moving her out of her home in August 2010 and then causing her to form a Trust of her assets three months later, in November 2010, without the knowledge and consent of Samuel Hall and Yassin Hall that will ultimately and fraudulently benefit them to the detriment of Samuel Hall, Yassin Hall and their heirs.

214. In furtherance of their plan, scheme and design, Elsa Hall and others have controlled all rental and other income that would otherwise be payable to Ethlyn Hall, and appropriated these amounts to their own use and benefit while using her lack of resources as part of the false justification for having moved her to Florida.

215. In furtherance of their plan, scheme and design, they deliberately sought to cause

Samuel Hall and Yassin Hall to worry about the health and well-being of Ethlyn Hall until she passed away.

216. Their willful, wrongful, intentional and calculated acts have been purposefully designed to drive a wedge between mother and son, and granddaughter and grandmother, and to wrongfully deny them the attention, time, association, contact, love and affection of Ethlyn Hall solely to advance their greed, avarice and pecuniary interest.

217. Their willful, wrongful, intentional and calculated acts have been purposefully designed to alienate Ethlyn Hall from her son and granddaughter, Yassin Hall, and the children of Yassin Hall and to wrongfully deny Yassin Hall and her children the attention, time, association, contact, love and affection of her grandmother, all to their detriment and solely to advance their own greed, avarice and pecuniary interest.

218. The conduct of Elsa Hall and others was intended to and did cause Samuel Hall and Yassin Hall and others emotional distress.

219. As a direct and proximate result of their wrongful conduct, Samuel Hall suffered emotional distress, pain of the mind and body, mental anguish, loss of sleep, and other physical symptoms, all to their detriment.

COUNT III

FRAUD

220. All allegations above are incorporated herein by reference as if set forth at length.

221. By sending out letters and emails to Samuel Hall through the use of U.S. mail, by fax and by email, purporting to be from Ethlyn Hall, who they are not, Elsa Hall committed fraud.

222. Elsa Hall sent those letters, email and faxes fraudulently to Samuel Hall in order to (a) obtain money from him under false pretenses, and (b) prevent him from fulfilling his commitment to his mother to see to the completion of the cottage of Yassin Hall, and (d) discourage him from looking out for his mother's best interests.

223. Elsa Hall's fraudulent conduct caused Ethlyn Hall in reliance thereon to move to Miami to her detriment and to the detriment of Samuel Hall, Yassin Hall and others.

224. Elsa Hall's conduct has been outrageous.

225. Samuel Hall is entitled to punitive damages as a result of her outrageous conduct.

COUNT IV

CIVIL CONSPIRACY/TORTIOUS INTERFERENCE

226. All allegations above are incorporated herein by reference as if set forth at length.

227. Elsa Hall, Phyllis Hall Brin and others have combined, agreed, conspired, planned and acted in such a way as to wrongfully, intentionally, and tortiously interfered with the relationship that Samuel Hall had with his mother, by denying him access to Ethlyn Hall and removing her from the Virgin Islands, knowing that her physical and mental condition has been impaired due to her advanced age and the undue influence of Elsa Hall.

228. Elsa Hall and others combined, agreed, conspired, planned and acted in such a way as to wrongfully, intentionally, and tortuously interfered with the relationship that Yassin Hall had with her grandmother, by denying her access to Ethlyn Hall and removing her from the Virgin Islands, knowing that her physical and mental condition has been impaired due to her advanced age and the undue influence of the Defendants.

229. Elsa Hall is liable to Samuel Hall and Yassin Hall for tortious interference with their relationship with Ethlyn Hall and the inheritance they would have received from Ethlyn Hall but for the wrongful conduct of Elsa Hall.

230. As a direct and proximate result of the wrongful conduct of Elsa Hall and others,

they have caused or attempted to cause Samuel Hall and Yassin Hall and the children of Yassin Hall the loss of their inheritance from Ethlyn Hall, as well mental anguish, pain, and other damages.

COUNT V

CONVERSION

231. All allegations above are incorporated herein by reference as if set forth at length.

232. Elsa Hall converted the property of Ethlyn Hall to her own use.

233. As a direct and proximate result of said conversion, Elsa Hall is liable to the Estate of Ethlyn Hall.

COUNT VI

MANDATORY INJUNCTION

234. All allegations above are incorporated herein by reference as if set forth at length.

235. Ethlyn Hall, up to the date of her death, was within the possession, dominion and control of Elsa Hall such that due to her advanced age, Samuel Hall and others have been forever denied the affections of Ethlyn Hall by virtue of her actions.

236. After the passing of Ethlyn Hall, and even before she was laid to rest on May 26, 2012, Defendant Elsa Hall sought in Family Court

to removal the notice of lis pendens placed on the property of Ethlyn Hall by Defendant Samuel Hall in order to protect against its transfer by Elsa Hall.

237. Elsa Hall attempted its removal without ever consenting to or submitting to the jurisdiction of the Family Court.

238. On May 15, 2012, Elsa Hall sought to get the Family Court to cancel the notice of lis pendens so that the property of Ethlyn Hall could be transferred or conveyed to another.

239. The Trust and Will should be invalidated as a result of the undue influence of Elsa Hall.

240. Unless this Court invalidates the Trust and the Will and enjoins Elsa Hall individually and as purported trustee of the Trust from disposing or transferring the property of Ethlyn Hall, she will exploit the property for her own benefit.

241. Samuel Hall has no adequate remedy at law to assure that Elsa Hall and others will turn over to its rightful heirs the property of Ethlyn Hall they wrongfully obtained.

242. Samuel Hall and Yassin Hall will suffer and have suffered irreparable injury if Elsa Hall succeeds in selling the property of Ethlyn Hall.

243. Money damages are inadequate to compensate Samuel Hall and Yassin Hall for the loss of their inheritance in this family property

unless the Court enjoins the wrongful conduct of Elsa Hall and others.

244. Samuel Hall is entitled to mandatory injunctive relief requiring Elsa Hall, individually and as the purported trustee of the Trust, to return to the estate of Ethlyn Hall her property wrongfully taken from her.

COUNT VII

ACCOUNTING

245. All allegations above are incorporated herein by reference as if set forth at length.

246. Elsa Hall and the Trust have received funds and property as described above, in an unknown amount, which was the property of Ethlyn Hall.

247. Samuel Hall requires this Court's intervention to order her to provide an accounting of all transactions concerning Ethlyn Hall's property and income that has been in her care, custody and control.

COUNT VIII

CONSTRUCTIVE TRUST

248. All allegations above are incorporated herein by reference as if set forth at length.

249. By reason of the wrongful manner in which Elsa Hall obtained and converted money and property belonging to Ethlyn Hall for her

personal benefit she and the Trust should be required to disgorge themselves of that income and property and be directed to place said property and all profits and improvements therefrom in constructive trust for the heirs at law and next of kin of Ethlyn Hall.

250. In the meantime, Samuel Hall, Yassin Hall and her children are entitled to the imposition of an equitable lien on the property of Ethlyn Hall.

COUNT IX

TORTIOUS INTERFERENCE

251. By fraud and undue influence, Elsa Hall induced the mother and grandmother, respectively, of Samuel Hall and Yassin Hall, while she was 94 years old, in ill health, of unsound mind and isolated from them, to transfer to the Trust her valuable property, in an attempt to cause her to disinherit Samuel Hall and Yassin Hall.

252. Elsa Hall tortiously interfered in the relationship between Defendant Samuel Hall and Yassin Hall, on the one hand, with Ethlyn Hall on the other and caused a wrongful interference with and deprivation of their intended legacy.

253. But for Elsa Hall's fraud and undue influence upon Ethlyn Hall, Defendant Samuel Hall and Yassin Hall as heirs at law of Ethlyn Hall would receive an inheritance from

Ethlyn Hall, which, by virtue of Elsa Hall's tortious conduct, she has sought to prevent.

254. As a direct and proximate result of Elsa Hall's wrongful conduct, Samuel Hall has sustained damages.

WHEREFORE Defendants pray for judgment against Plaintiffs jointly and severally for compensatory and punitive damages as may be proven at trial, and for injunctive relief as follows:

a. Requiring Plaintiffs to return to the estate of Ethlyn Hall her property they wrongfully took from her and which would thereby constitute the inheritance of Defendant Hall and Yassin Hall

b. Enjoining Plaintiff from wasting the assets of Ethlyn Hall and requiring Plaintiffs to account for her assets in their possession or converted by them;

c. Removing Elsa Hall as trustee of the Trust;

c. Requiring Plaintiff to account for the income and property of Ethlyn Hall;

d. Imposing a constructive trust;

e. Invalidating the Will and the Trust and disgorging from Elsa Hall and the Trust and others, the money and property belonging to Ethlyn Hall and placing said property and all profits therefrom in constructive trust for the heirs at law and next of kin of Ethlyn Hall;

f. Such and further relief as [] the Court may seem just, equitable and proper.

Respectfully submitted,

DATED: February 28, 2013

s/ Samuel H. Hall, Jr.
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IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

SAMUEL H. HALL, JR., PLAINTIFF, v. ELSA HALL, DEFENDANT.	CIVIL. NO. 3:13-cv-00095 ACTION FOR DAMAGES AND FOR AN ACCOUNTING JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

(Filed Dec. 16, 2013)

Plaintiff Samuel H. Hall, Jr., by and through the undersigned counsel, and as his First Amended Complaint alleges as follows:

1. This Court has diversity jurisdiction pursuant to 28 U.S.C. Section 1332.

2. The amount in controversy exceeds $75,000.

3. Plaintiff Samuel H. Hall, Jr. ("Samuel Hall") is a citizen of the Virgin Islands, residing in St. Thomas, U.S. Virgin Islands, and is the son of Ethlyn Hall.

4. Yassin Hall, is a citizen of Florida and is the granddaughter of Ethlyn Hall and the only child of Victor Hall, son of Ethlyn Hall.

5. Phyllis Hall-Brin, is a citizen of the Virgin Islands, residing at # 156-157 Estate Enighed and Contant, Cruz Bay, St. John, Virgin Islands, and is the daughter of Ethlyn Hall.

6. Defendant Elsa Hall, is a citizen of Florida and is the daughter of Ethlyn Hall.

7. Elsa Hall is named herein individually.

8. Tanya Muldrow is a citizen of the state of Georgia and is the daughter of Phyllis Hall-Brin.

9. Ethlyn Hall ("Ethlyn Hall") was a citizen of the Virgin Islands at the time of her death and is the mother of the Samuel H. Hall, Jr., Phyllis Hall-Brin and Elsa Hall, and the grandmother of Yassin Hall and Tanya Muldrow.

10. Ethlyn Hall died on May 5, 2012 in Miami, Florida.

11. Ethlyn Hall was moved out of her home at No. 16 Peter Bay, St. John, and eventually to Miami, Florida at a time when she was mentally unable to make an informed decision about her domicile or care due to the undue influence of Elsa Hall.

12. In 1975, Estate Peter Bay, St. John was partitioned into 1/6th shares. Ethlyn Hall received approximately eight acres as a result of the partition.

13. Ethlyn Hall received from the partition approximately 1.5 acres in lower Peter Bay (Parcel 16) and approximately six acres in Upper Peter Bay (Parcel 17).

14. Ethlyn Hall's Peter Bay property was in addition to the Cruz Bay property she and

Samuel Hall, Sr. owned, known as Parcel No. 156-157 Estate Enighed and Contant.

15. For over 30 years, starting in the 1970's, Samuel Hall provided legal and other assistance for Ethlyn Hall without seeking or obtaining any compensation or remuneration in the form of money or property.

16. In 1970's, when Samuel Hall, Sr. and Ethlyn Hall divorced, Samuel Hall was designated by their divorce court judge, in accordance with the agreement of his mother and father, to oversee the allocation of net rental income from their Cruz Bay property between them, and he did so voluntarily and without any financial compensation or remuneration.

17. In 1981, when Samuel Hall, Sr. agreed to sell his one-half interest in the Cruz Bay property to Ethlyn Hall, Samuel Hall, Jr. cosigned the bank loan of Ethlyn Hall allowing her to purchase his one-half interest.

18. During the 1980-1990's, St. John Land Investment Limited sought to collect from Ethlyn Hall 1/6th the cost of constructing a concrete subdivision road with underground utilities, security gate and gate openers, roadside stonework and landscaping in lower Peter Bay.

19. The cost of said work was several hundred thousand dollars if it was not in excess of $1 million.

20. Through the legal efforts of Plaintiff Samuel Hall, Ethlyn Hall did not have to pay for any of the cost of the roadwork.

21. Samuel Hall, on behalf of Ethlyn Hall was successful in discouraging St. John Land Investment from attempting to collect from her 1/6th of the cost of the work.

22. If Ethlyn Hall had been forced to pay 1/6th the cost of the work, she would have been forced to sell some of her property in order to do so.

23. In the 1980's, Samuel Hall assisted his mother in the construction of her house at Parcel 16 by providing her with construction materials and equipment from St. Thomas at no cost to her.

24. In 1990, when Victor Hall attempted to adversely possess his mother's property in lower Peter Bay, Samuel Hall successfully sued to evict Victor Hall on behalf of Ethlyn Hall and successfully defended Ethlyn Hall from his adverse possession claim in the Territorial Court F.E.D. No. 218/1990 and in the District Court App. Div. Misc. No. 1990-18.

25. In 1990, Samuel Hall recommended that Ethlyn Hall place her Cruz Bay property in her name along with that of Elsa Hall and Phyllis Hall as joint tenants in order to provide them with economic security.

26. When Ethlyn Hall asked if he should be included, he declined to be included on the deed.

27. On April 25, 1990, at the recommendation of Samuel Hall, and with his legal assistance in preparing the deed, Ethlyn Hall, conveyed by quitclaim deed her seven dwelling unit guest house doing business as Hillcrest Guest House ("Hillcrest Guest House"), located on Parcel No. 156-157 Estate Contant and Enighed, St. John, to herself, Phyllis and Elsa, as joint tenants, reserving for herself, however, a life estate in all rents and profits.

28. Ethlyn Hall did this in order to provide a home and shelter to Elsa Hall and Phyllis Hall, who had failed to purchase or otherwise acquire real property or a house of their own, while at the same time preserving her right to the guest house income in case she needed it.

29. Ethlyn Hall also allowed Phyllis Hall-Brin to live at the Hillcrest Guest House in a three bedroom apartment rent-free since April 25, 1990 on condition that she manage the rental of the guest house and provide her with the net income.

30. However, after the conveyance, Phyllis Hall-Brin failed to continue to provide her mother with her portion of the net income. Instead, except for paying the telephone and light bill for her mother's home at No. 16 Estate Peter Bay, Phyllis Hall Brin kept the net income for her own use.

31. Ethlyn Hall complained about Hall-Brin's actions in converting the rental income from

the Hillcrest Guest House to her own personal use.

32. In 1999, Defendant Elsa Hall asked her mother to convey to her property in Estate Peter Bay, St. John.

33. In June 1999, after her mother agreed to give Defendant Elsa Hall one acre, Samuel Hall prepared a quit-claim deed at the request of his mother, in order to cause Elsa Hall to quit-claim her interest in the seven dwelling unit guest house (Hillcrest Guest House), and to receive in exchange a deed of gift from Ethlyn Louise Hall to approximately an acre in Estate Peter Bay.

34. By deed dated June 4, 1999, Elsa Hall quit-claimed to Ethlyn Hall and Phyllis Hall Brin her interest in the Hillcrest Guest House.

35. After obtaining the acre, Elsa Hall was unsuccessful in operating a landscaping business on the property, and eventually discontinued the landscaping business.

36. She was also unsuccessful in operating a campground on the property

37. She has also been unsuccessful in remaining gainfully employed by others for any significant length of time.

38. In 1999, Elsa Hall also asked Samuel Hall to incorporate a business she called Botanical Villas, Inc. in order to operate a campground on her property, and he incorporated it for her at no cost to her for his services.

39. Elsa Hall also asked Samuel Hall to co-sign a truck loan for her and he did that too.

40. However, the buildings Elsa Hall built on her property were plywood shanties, not botanical villas, and were not been kept clean and safe.

41. This caused them to receive highly unfavorable guest reviews, which appear online at www.tripadvisor.com when a search for "St. John Botanical Villas" is conducted.

42. In 1999, in exchange for the deed t[illegible] one acre, Elsa Hall quit-claimed and relinquished her interest in the Hillcrest Guest House in order to obtain the first of two adjacent acres of land she received from her mother in Estate Peter Bay, St. John.

43. In 1990, St. John Land Investment Limited desired to construct a concrete subdivision road, stonework, landscaping, security gate and gate opener in Upper Peter Bay, with the road work to be done in the location established by the 1975 partition decree pursuant to which Ethlyn Hall obtained title to her Peter Bay property.

44. Instead of seeking to have Ethlyn Hall pay 1/6th of the cost, St. John Land Investment, Ltd. agreed, in exchange for Samuel Hall on behalf of Ethlyn Hall obtaining the CZM permits to build the concrete road, stone walls, and landscaping, to perform the roadwork without requiring Ethlyn Hall to pay 1/6th of its cost.

45. If Ethlyn Hall had been forced to pay 1/6th the cost of the work, she would have been forced, as a retiree, to sell some of her property in order to do so.

46. The cost of said roadwork was several hundred thousand dollars if it was not in excess of $1 million.

47. Samuel Hall also retained the services of architect John Woods to design the subdivision road in Upper Peter Bay and paid for the architectural services himself.

48. On December 13, 1999, Samuel Hall applied for minor CZM permit on behalf of his mother to construct portion of the Subdivision road in Upper Peter Bay pursuant to a power of attorney from his mother authorizing him to do so.

49. Neither Ethlyn Hall nor any of her children, except for Samuel Hall, or her grandchildren paid for any of the cost of the roadwork in Upper Peter Bay.

50. On November 17, 2000, Samuel Hall applied for another CZM permit on behalf of Ethlyn Hall in order to permit to construct another portion of the subdivision road in Upper Peter Bay, pursuant to a power of attorney given to him by Ethlyn Hall.

51. The roadwork cost hundreds of thousands of dollars if not more than $1 million.

52. Through the efforts of Samuel Hall, Ethlyn Hall paid none of the cost of the roadwork.

53. In addition, in 2001, Samuel Hall, on behalf of Ethlyn Hall, also arranged for the exchange of easements and of substandard parcels owned by Ethlyn Hall (Parcel 17-B and 17-3) for a larger, substandard parcel owned by St. John Land Investment (Parcel 15-7), so that each party obtained a substandard parcel that, when added to their remaining property, enhanced its value. In addition, the substandard parcel Ethlyn Hall received was larger and more valuable than the substandard parcels she gave up in exchange.

54. Ethlyn Hall also obtained from St. John Land Investment, Ltd. at no cost to her, through the assistance of Samuel Hall, a contractual commitment to construct an additional concrete access road to her property, of similar construction as the concrete subdivision road, and the access road was constructed as agreed.

55. In 1998 or 1999, through 2002, Samuel Hall also successfully represented his mother in the case of Peter Bay Homeowners Association v. Stillman, et. al., a lawsuit filed in the District Court of the Virgin Islands, in order to protect Ethlyn Hall from the claim of the Peter Bay Homeowners Association that its members had a 50 foot easement over her beachfront property (Parcel 16) in lower Peter Bay, and from their claim that she was obligated to be a dues-paying member of the Association.

56. In 2002, he also successfully represented his mother on appeal of the case to the U.S. Court of Appeals for the Third Circuit.

57. Starting in 2001, Samuel Hall also assisted Ethlyn Hall in subdividing her property in upper Peter Bay, after the concrete road and other road improvements were completed.

58. He accomplished the subdivision at considerable cost, time and expense to himself, including paying for the engineering and surveying costs himself.

59. On or before April 2002, with the legal assistance of Samuel Hall, after he completed the subdivision of Parcel 17 after considerable expenditure of his own time, money and effort, Ethlyn Hall conveyed by deed of gift the second of two acres in Estate Peter Bay to Elsa Hall (Parcel 17-2), an acre, more or less, to her daughter Phyllis Hall[-]Brin (Parcel 17-4), an acre, more or less, to her son (Parcel 17-5); and caused the conveyance of an acre, more or less, to her granddaughter, Yassin Hall (Parcel 15-7 and 17-6).

60. Samuel Hall did not seek or obtain a gift of any property from his mother beyond the one acre parcel she decided to give him.

61. In 2002 and 2003, Samuel Hall, on behalf of Ethlyn Hall, without any cost to her, also negotiated with John ("Jack") Andrews a long-term ground lease on a one acre parcel known and described as Parcel No. 17-7 Estate Peter Bay.

62. In exchange for the construction of two cottages, one on the property of Phyllis Hall-Brin and one on the property of Yassin Hall, Andrews was to receive a 50 year ground lease to an unimproved acre of land known as Parcel 17-7.

63. On January 24, 2003, the Ground Lease to Parcel 17-7 was executed between Ethlyn Hall and the Andrews St. John Trust ("Andrews").

64. Samuel Hall did not ask for or seek to obtain any benefit from the Ground Lease he successfully negotiated, or receive any financial compensation or remuneration for conceiving of and successfully negotiating the Ground Lease.

65. Ethlyn Hall greatly appreciated the continued efforts of her son on her behalf and on behalf of the family.

66. Although initially the construction of cottages under the Ground Lease for Elsa Hall and Phyllis Hall-Brin were recommended by Samuel Hall to his mother, Ethlyn Hall, she decided that Elsa Hall had already received enough from her, having been given approximately two acres, one more acre than anyone else, and the two acres were more valuable than one acre with a cottage.

67. Ethlyn Hall decided that the two cottages were to be built by Andrews for Phyllis Hall-Brin and Yassin Hall, the only child of Ethlyn

Hall's deceased son, Victor Hall, on their respective parcels.

68. On March 2003, Andrews made a separate proposal to Elsa Hall to develop her property and build cottages on her property but she rejected it.

69. After the Ground Lease was executed, Elsa Hall insisted to her mother that she should get a cottage and eventually caused her mother to request from Samuel Hall by letter dated April 23, 2003, that she be provided with a cottage, which would have required amending the Ground Lease and extending its term.

70. However, Andrews was not agreeable to amending the Ground Lease to extend its term in order to build a third cottage.

71. Elsa Hall became upset with Samuel Hall for not obtaining for her a cottage free of cost to her under the Ground Lease and stopped speaking to him in 2003.

72. Elsa Hall then listed her property for rent under a long-term lease but was unable on her own to obtain a tenant.

73. Subsequently, Elsa Hall listed her property for sale, but was unable to obtain a buyer until June 2012, approximately one month after her mother passed away, and she sold it at a significantly reduced price.

74. Elsa Hall has continually exploited her mother's resources for her own care. In fact,

she attempted unsuccessfully, after Ethlyn Hall had died on May 5, 2012, but before she was buried on May 26, 2012, to remove the lis pendens Samuel Hall placed on the property of Ethlyn Hall in 2011 in order to protect it from Elsa Hall and the Trust, while he sought the appointment of a guardian for his mother.

75. Elsa Hall was then forced to sell her own property within days after the passing of her mother, because she could no longer rely on her mother's income for support.

76. Ethlyn Hall was born on June 6, 1916 in St. John, Virgin Islands and died on May 5, 2012 and was 95 years old at the time of her death.

77. Prior to August 11, 2010, Ethlyn Hall lived in her two story, two dwelling unit, beachfront home located at No. 16 Peter Bay, St. John, Virgin Islands.

78. Prior to August 11, 2010, Ethlyn Hall was looked after by Samuel Hall and he provided her with assistance besides legal assistance over a period of many years.

79. He took her to the doctor, the St. John clinic, St. Thomas hospital and other places, bought her groceries, cleaned her yard, fixed her driveway, installed fans in her house, maintained her home, bought her appliances, built her a storage shed, picked up her mail, made her bank deposits, obtained for her direct deposit of her retirement income, saw to her medical care and also represented her in

lawsuits and assisted her in subdividing, leasing, conveying and distributing her real property in accordance with her wishes.

80. Prior to August 11, 2010, Elsa Hall did not provide for the care of Ethlyn Hall, despite her mother's generosity towards her. Instead, she depleted her resources by spending her money, eating her food, occupying her residence and requested and obtained funds from her to live, repair her truck and to travel to and from Florida.

81. Whenever Elsa Hall was in St. John, she lived in the home of Ethlyn Hall, slept on her couch, ate her food, and sometimes occupied her downstairs apartment.

82. Elsa Hall also rented out the downstairs apartment of Ethlyn Hall on a short-term basis, from time to time, in order to obtain income for herself.

83. On or about August 11, 2010, Elsa Hall removed Ethlyn Hall from her home at No. 16 Peter Bay in order to isolate her from Samuel Hall and Yassin Hall.

84. On or about August 11, 2010, Samuel Hall and Yassin Hall went to the home of Ethlyn Hall and found it vacant and devoid of her personal effects, and did not know where she was or whether she had passed away.

85. When Ethlyn Hall was moved into a unit in the Hillcrest Guest House in Cruz Bay in August 2010, Elsa Hall moved in with her and slept in her apartment, ate her food and

spent her money. She also depleted her savings.

86. After August 11, 2010, Elsa Hall rented out her mother's two dwelling unit home at No.16 Peter Bay. Upon information and belief, the income derived from the rental of Ethlyn Hall's two dwelling unit home at No. 16 Peter Bay was not utilized exclusively for Ethlyn Hall's benefit.

87. Thereafter, she moved her mother to Miami, Florida without the prior knowledge of Samuel Hall or Yassin Hall and concealed from them her telephone number, address and whereabouts until the day Ethlyn Hall died.

88. In Miami, Elsa Hall continued to live off of the income and assets of Ethlyn Hall until the day she died.

89. Phyllis Hall-Brin, after benefiting from the love of Ethlyn Hall turned her back on her mother after she received: (a) a half interest in the Hillcrest Guest House in which she has lived rent free since 1990 and from which she has kept rental income to which Ethlyn Hall is entitled; (b) a one acre parcel of land in Estate Peter Bay known and described as Parcel 17-4 Peter Bay; and (c) the right to have a cottage built by Andrews on her Parcel 17-4.

90. Phyllis Hall-Brin turned away from her mother just as or shortly after construction began on her cottage in early 2006.

91. On October 13, 2006, after Phyllis Hall-Brin continued to neglect her mother, Samuel Hall sent an email to her and several other members of the family requesting that they provide Ethlyn Hall with attention, care and assistance.

92. Despite receipt of that communication, Phyllis Hall-Brin continued to keep her mother's income from Hillcrest House, ignore her care and welfare, and failed to allow her to use a dwelling unit in the Hillcrest Guest House. For a long period of time she did not communicate with her mother, including on Christmas, Thanksgiving, Valentine's Day, Easter, or her birthday.

93. Phyllis Hall-Brin also stopped speaking to Samuel Hall and his wife after she was urged as the only child of Ethlyn Hall who at the time resided on St. John full-time, to look out for her mother's well-being and care.

94. Phyllis Hall-Brin, who is retired and lives on St. John, did not even show up when EMTs called her about her mother's illness after her mother had called for an ambulance. The EMTs waited with Ethlyn Hall at her home until Samuel Hall and his wife arrived on St. John from St. Thomas.

95. On another occasion, while Samuel Hall was on the U.S. Mainland in May 2009, Phyllis Hall-Brin refused to pick up her mother at the Myrah Keating-Smith Clinic in St. John until she was told by the clinic staff that her mother had to be released to a family

member not to the non-family member Samuel Hall arranged from the mainland to pick her up.

96. On March 5, 2007, by email, Samuel Hall reminded Phyllis Hall-Brin, even as her mother's Ground Lease was funding the construction of her cottage, of the need for her to contact and communicate with her mother. He informed her by email that all her mother needed is a once-a-week phone call for just 15 minutes.

97. Notwithstanding this reminder, the continued generosity of her mother and her mother's forbearance from seeking more aggressive measures to ensure that Phyllis Hall Brin turned over to her the rental income that was due to her, Hall Brin continued to ignore the welfare of her mother, and failed to visit her or call her once-a-week.

98. She did not visit her mother, assist her in obtaining groceries, return her phone calls or otherwise honor her mother.

99. Thus, on and before August 3, 2007, Ethlyn Hall decided to discontinue funding a cottage for Phyllis Hall Brin, who was not taking care of her, and decided instead to reprogram the funds towards construction of the house of Samuel Hall, who was taking care of her.

100. On August 3, 2007, Ethlyn Hall voluntarily signed a statement addressed to whom it may concern, with full knowledge of what she was doing, reprogramming the funds

under the Ground Lease from the property of Phyllis Hall to the property of Samuel Hall, while authorizing him to complete the construction on the property of Yassin Hall.

101. On August 4, 2007 she signed a Power of Attorney and an Assignment, giving him complete authority over the Ground Lease in order to successfully complete the construction of the house of Yassin Hall and to assist in the completion of his own house, and to see to the future development of Parcel 17-7, which he did.

102. In August 2007, Ethlyn Hall was pleased that her son had taken care of her through the years and was willing to continue to take care of her in the future and undertake the completion of the home of Yassin Hall.

103. Ethlyn Hall, at the time she signed those documents, was pleased that she was able to assist her son financially, for the first time since he graduated from law school in 1975 instead of the other way around.

104. In 2004, Samuel Hall began construction with his own funds of his own home in St. John on the property given to him by his mother in 2002. At the time he began construction of his home, and until Phyllis Hall failed to look after their mother, he never sought or obtained any financial assistance from Ethlyn Hall to complete his home on Parcel 17-5.

105. Prior to August 3, 2007, Samuel Hall was not a beneficiary of the Ground Lease he successfully negotiated on behalf of his mother with Andrews for the benefit of Phyllis Hall-Brin and Plaintiff Yassin Hall.

106. He became a beneficiary only after his sister failed for a long period of time to honor her elderly mother, and converted substantial rental proceeds due to her mother from the Hillcrest Guest House for Hall-Brin's own personal use and benefit.

107. For a period of almost two years thereafter the reprogramming of the funds from the Ground Lease, Phyllis Hall-Brin continued to ignore her mother's welfare, and avoided communicating with Samuel Hall.

108. Then on June 8, 2009, Phyllis Hall-Brin wrote an email accusing Samuel Hall of failing to see to the construction of her cottage.

109. In response, Samuel Hall chastised her in a reply email for not taking care of her mother, ignoring her at Christmas, birthdays and other holidays, and confirmed why, due to her neglect of her mother, her cottage's construction was halted back in 2007.

110. Phyllis Hall[-]Brin never responded to the email of Samuel Hall. Instead, she sought unsuccessfully to have her mother reprogram funds back to the construction of her cottage, which her mother refused to do.

111. Phyllis Hall-Brin continued to keep the rent from the seven dwelling units at Hillcrest

Guest House to which her mother was legally entitled.

112. Even as her mother deteriorated physically and mentally, she continued to keep her rental income, and ignore her needs.

113. In March 2010, Ethlyn Hall complained to her son, Samuel Hall that Phyllis Hall would not let her stay in an apartment in the Hillcrest Guest House, was stealing her money and was coming into her home at night and had stolen her Bible.

114. On March 22, 2010, Ethlyn Hall asked her son to prepare a letter for her signature asking Phyllis Hall-Brin, beginning with the month of April, to send her a written monthly report of revenues and expenses along with a check for 50% of the net income by the 15th of the following month and on the 15th day of each month thereafter.

115. Phyllis Hall-Brin never responded to the March 22, 2010 letter from her mother.

116. Phyllis Hall-Brin failed to provide Ethlyn Hall with any written monthly reports from the operations at the Hillcrest Guest House. Instead, she continued to keep her mother's income.

117. Over a period of years, Phyllis Hall-Brin and Elsa Hall have depleted their mother's savings and resources without materially helping to improve her lot in life or provide for her care and comfort.

118. Elsa Hall represented to her mother that she needed money for various things and constantly asked her to send her money while she was living in Florida. She also asked her to sign social security documents in blank so she could obtain disability benefits.

119. Her mother also provided funds for Elsa to improve her property, and on occasion gave her the rent from her downstairs apartment at No. 16 Peter Bay or its furnishings for her use or for the use of guests of her Botanical Villas.

120. As long as Ethlyn Hall was physically healthy and mentally sound, she was able to keep Elsa Hall and Phyllis Hall at bay. However, as she got older, she began to physically and mentally deteriorate and beaome [sic] paranoid. Ethlyn Hall was frail, infirm and of failing mind and body due to her advanced age and health. She was not capable of making decisions concerning her affairs because of failing memory, dementia and paranoia and the ease with which she may be unduly influenced.

121. In late 2009, she began to imagine people coming into her house in the middle of the night, including Phyllis Hall, to steal her Bible, steal her money and take her property.

122. In 2010, she complained repeatedly to her son, Samuel Hall, that she was not right in the head.

123. Sometimes she would sleep in a chair by the door at night with a string around the doorknob to keep out intruders.

124. Sometimes she would ask to sleep in Samuel Hall's home in St. John and did so on occasion in order to feel safe. Sometimes she also stayed during the week in his house on St. Thomas, where he encouraged her to stay during the week, but she frequently declined to do so.

125. In August 2010, Ethlyn Hall was no longer able, physically and mentally, to keep Elsa Hall and Phyllis Hall-Brin at bay. As a result, they were able to move her out of her home at No. 16 Peter Bay on the pretense that they were going to paint it and return her to it. Instead, they took her furniture for their own purposes and rented out her house from under her for their own purposes.

126. Elsa Hall and Phyllis Hall-Brin put Ethlyn Hall in a dwelling unit in the guest house that Phyllis Hall-Brin had long denied her access to and continued to keep her rent from the remaining units.

127. Elsa Hall and Phyllis Hall-Brin caused her to sleep on a futon instead of in her own queen size mahogany bed.

128. Elsa Hall and Phyllis Hall-Brin also duped Ethlyn Hall into thinking that she no longer had a place to stay in St. John.

129. In order to accomplish their objectives, Elsa Hall, Phyllis Hall-Brin and Tanya Muldrow

conspired to isolate their mother from her son, Samuel Hall, and her granddaughter, Yassin Hall, and others.

130. In August 2010, Elsa Hall and Phyllis Hall-Brin took Ethlyn Hall, from her home at No. 16 Peter Bay without the knowledge or consent of Samuel Hall and Yassin Hall.

131. Within days after moving her mother out of her home, Elsa Hall posted her house for rent on her Botanical Villas website.

132. In August 2010, Samuel Hall and Yassin Hall traveled to No. 16 Peter Bay in order to let Ethlyn Hall know that Yassin Hall was returning to Florida and discovered that the home of Ethlyn Hall had been stripped of furniture, and other contents and all of her personal effects.

133. Samuel Hall and Yassin Hall also discovered on that day that the downstairs apartment of Ethlyn Hall had been rented out by Elsa Hall to two University of the Virgin Islands students.

134. Elsa Hall also took the storage shed of Ethlyn Hall on Parcel 16 that Samuel Hall had built for her, and moved the shed onto the beach and attempted to rent it out as living accommodations without amenities such as running water, electricity, toilet facilities, certificate of occupancy or CZM approval.

135. Elsa Hall and Phyllis Hall-Brin also made it difficult for Samuel Hall to locate and speak with his mother. Without his knowledge,

they moved her into one of her apartments in the Hillcrest Guest House where she had been previously denied access by Phyllis Hall-Brin. They located her in an apartment behind a cyclone fence, which was inaccessible by visitors without encountering Rottweilers of Phyllis Hall-Brin.

136. Then Elsa Hall wrote letters to Samuel Hall which she caused his mother to sign without her understanding or appreciating their significance, demanding money and making assertions Elsa Hall knew to be false.

137. No such letters or demands for money were ever written or sent to Samuel Hall by his mother prior to Elsa Hall and others moving her out of her home in August 2010, where she was not isolated from anyone.

138. Elsa Hall and Phyllis Hall-Brin caused their mother to reject $4,767.42 sent to her by Samuel Hall, made payable to the Virgin Islands Bureau of Internal Revenue, to help pay her property taxes after she had requested the money from him in a telephone call. Instead, they wanted the check made out to her so that they could get her to endorse it and then spend it for their own benefit.

139. In addition to sending Samuel Hall letters purporting to be from his mother, Elsa Hall created an email address through which she sent email to Samuel Hall purporting to be from Ethlyn Hall.

140. The email address Elsa Hall created purporting to be Ethlyn Hall is the email address ethlynhall@yahoo.com.

141. Elsa Hall created this email address, not Ethlyn Hall, because Samuel Hall's 95 year old mother could not type, did not know how to use a computer, create an email address or send email.

142. In August 2010, Elsa Hall and Phyllis Hall grabbed their mother from her home in which she had lived for over 20 years, isolated her from Samuel Hall and Yassin Hall and by November 2010 caused her to transfer her property into a Trust for such purposes as they wished.

143. They did this without the knowledge or consent of Samuel Hall or Yassin Hall.

144. Prior to creation of the Trust, Ethlyn Hall owned and lived in her home Parcel No.16 Estate Peter Bay, St. John.

145. Prior to the creation of the Trust, she owned Parcel No. 17-7 Estate Peter Bay.

146. In November 2010, three months after Ethlyn Hall was isolated from her son and Yassin Hall, and without their knowledge or consent, Elsa Hall, Phyllis Hall-Brin and Tanya Muldrow caused the creation of the Trust into which they caused Ethlyn Hall, through the exercise of undue influence, to transfer her assets in order to benefit individuals they wished to benefit.

147. At the time the Trust was executed by Ethlyn Hall, Defendant Elsa Hall enjoyed a confidential relationship with Ethlyn Hall.

148. On April 22, 2011, Samuel Hall first learned of the Trust when he received from Attorney Andrew Simpson ("Simpson") a draft of the complaint he proposed to file against him.

149. Although Simpson disclosed the existence of the Trust in the draft complaint, he sought to conceal on behalf of Elsa Hall the terms of the Trust.

150. Over the objection of Plaintiff, the District Court reviewed the Trust *in camera* for the purpose of determining jurisdiction over the parties.

151. Plaintiff never saw the Trust until January 2013, when it was produced by Simpson for the first time in discovery.

152. The tortious interference of Elsa Hall with the right to inherit of Samuel Hall and Elsa Hall was discovered in January 2013 when Plaintiff was provided with a copy of the Will and the Trust.

153. The effort of Defendant to deny Plaintiff his inheritance through her wrongful conduct was discovered in January 2013 when Plaintiff was provided with a copy of the Will and the Trust by Simpson as required by the Federal Rules of Civil Procedure.

154. At that time, Plaintiff learned that the Will and Trust executed by his mother and

subsequently amended further in Florida excluded him and Yassin Hall as beneficiaries of Ethlyn Hall and through discovery in that case learned that Defendant Elsa Hall had abused and misused her relationship with Ethlyn Hall to take possession of all of her real and personal property.

155. In discovery, Plaintiff learned that Defendant Hall obtained long-term leases to the property of Ethlyn Hall, possession of her rent, savings and checking account, and in her name sought to sell all of her property within months of moving her to an undisclosed location in Florida.

156. Elsa Hall subsequently continued to conceal the whereabouts of Ethlyn Hall from Samuel Hall and Yassin Hall.

157. Elsa Hall never disclosed to him or Yassin Hall before she moved Ethlyn Hall to Florida that she had arranged for Ethlyn Hall to execute the Trust.

158. After the death of Victor Hall, Ethlyn Hall's youngest son, in an ongoing effort to isolate her from Samuel Hall, Yassin Hall and others, Elsa Hall also caused Ethlyn Hall to faint in March 2011 by moving her into plywood shanties that exist without modern amenities at Botanical Villas, the property owned by Elsa Hall, causing her to need medical care at the St. John clinic.

159. As a result of the efforts of Elsa Hall, Phyllis Hall-Brin and Tanya Muldrow to deny him

access to his mother, the last time Samuel Hall saw and spoke to his mother before she died on May 5, 2012 was at the St. John Clinic in March 2011.

160. After learning his mother was in the Myrah Keating Smith Clinic in St. John, Samuel Hall immediately went to the clinic along with his wife to see his mother.

161. At the clinic, he talked with his mother about the passing of his brother, whether his brother suffered from the same illnesses as his father, and her need to eat whether she felt like it or not.

162. As always, Ethlyn Hall, whenever she saw Samuel Hall, was happy to see him and never raised any issues with him concerning his care of her, the Ground Lease, or the construction of improvements on his parcel or that of Yassin Hall, or any other matter relating to property or assistance.

163. Ethlyn Hall was also happy to see Diana Hall, the wife of Plaintiff Hall, who had been like a daughter to her, took care of her and Ethlyn Hall never raised any issues with her at the hospital.

164. The last time Samuel Hall saw his mother alive was at the Myrah Keating Smith Clinic in St. John.

165. In early April 2011, Elsa Hall prevented Yassin Hall from visiting her grandmother while she was on St. John for the funeral of her father, Victor Hall.

166. Elsa Hall hid Ethlyn Hall from Yassin Hall because she was afraid that Yassin would learn of the creation of the Trust in November 2010, and the exploitation of her resources, and of the plans to move Ethlyn Hall to Florida.

167. As a result of the efforts of Elsa Hall, Yassin Hall never saw or spoke to her grandmother again.

168. Yassin Hall did not even see Ethlyn Hall at the funeral of her father, Victor Hall, because Elsa Hall did not allow Ethlyn Hall to attend the funeral and actively sought to prevent Yassin Hall from visiting her grandmother while in St. John for her father's funeral.

169. Yassin Hall was denied the opportunity to see and speak to her grandmother in person in August 2010, April 2011 and again in October 2011.

170. Not only did Elsa Hall and Phyllis Hall-Brin not attend the funeral of their brother, Victor Hall, in April 2011, or assist in the cost of his burial, they kept Ethlyn Hall from the funeral services for her son, which was held in St. John on April 4, 2011.

171. Nor did Elsa Hall or Phyllis Hall-Brin attend the funeral of Ethlyn Hall on May 26, 2012, which was also held on St. John, or assist in paying for the cost of her burial or the construction of her vault.

172. Phyllis Hall Brin lives in St. John just up the hill from the Lutheran Church where the funeral services for Ethlyn Hall were held.

173. In May 2011, after they moved Ethlyn Hall to Florida, Elsa Hall took advantage of Ethlyn Hall's failing memory, dementia and paranoia and used her undue influence over her and caused her to authorize this lawsuit against Samuel Hall.

174. Elsa Hall found Andrew Simpson, the lawyer who filed this suit, and arranged for him to meet with Ethlyn Hall.

175. From April 2011 until May 5, 2012, Ethlyn Hall lived in Miami, hidden from Yassin Hall and Elsa Hall until the day she died.

176. Due to her mental and physical infirmity, she could not walk or otherwise leave her apartment or contact Samuel Hall or Yassin Hall.

177. Before she died, Elsa Hall also caused Ethlyn Hall to execute a Last Will and Testament on June 3, 2011, giving all of her rest to the Trust, and appointing Elsa Hall and appointing her Personal Representative under the Will.

178. Elsa Hall lived with Ethlyn Hall at the time the Will was signed by Ethlyn Hall, in the same Miami dwelling as Ethlyn Hall, relied on the income from Ethlyn Hall for her own existence, and utilized the resources of Ethlyn Hall as she saw fit.

179. At the time the Will was executed by Ethlyn Hall, Elsa Hall enjoyed a confidential relationship with Ethlyn Hall.

180. Plaintiff Hall first learned of the Will on or about January 21, 2013, when he received the motion for leave to amend the complaint and the proposed First Amended Complaint filed in this action (Doc. Nos. 32 and 33).

181. Ethlyn Hall lacked the mental capacity to change her domicile from the Virgin Islands to Florida, or to sign the Trust or the Will.

182. Plaintiff Hall also learned for the first time from paragraph 12 the proposed amended complaint that Elsa Hall filed a probate action in Miami to probate the will in Florida.

183. Elsa Hall never gave to Plaintiff Hall or to Yassin Hall, as the heirs at law and next of kin of Ethlyn Hall, notice of her efforts to probate the Will.

184. Had Plaintiff Hall not challenged the survivability and assignability of tort claims of Ethlyn Hall to the Trust, the proposed First Amended Complaint would not have been filed and he would never have been informed by Elsa Hall of the existence of the Will or the effort by Elsa Hall to probate the Will in Florida.

185. Elsa Hall also asked others to conceal from Samuel Hall the existence of the Trust and the Will, and the whereabouts of Ethlyn Hall.

186. Yassin Hall resides in Florida, where her grandmother Ethlyn Hall was taken, but Elsa Hall, Phyllis Hall-Brin and Tanya Muldrow failed to notify her of her grandmother's whereabouts in Miami and prevented Yassin Hall from having any contact with her grandmother even though both were located in Florida.

187. After a guardianship action was filed in the Family Court in St.Thomas in April 2011 by Yassin Hall and Samuel Hall, seeking the appointment of a guardian for Ethlyn Hall, Elsa Hall and Phyllis Hall Brin opposed the appointment of a guardian.

188. On October 5, 2011, Yassin Hall appeared in the Family Court and learned from the Family Court judge exactly where her grandmother was being kept in Miami by Elsa Hall.

189. On October 5, 2011, after appearing in Family Court in St. Thomas and after discovering in Family Court where her grandmother was being kept in Miami by Elsa Hall, Yassin Hall travelled to Miami on October 5, 2011 and attempted to see her grandmother but Elsa Hall prevented her from doing so by refusing to open the apartment door of the apartment of Ethlyn Hall.

190. On October 5, 2011, in the presence of witnesses, Elsa Hall refused to open the door to Ethlyn Hall's apartment to let Yassin Hall see or speak to her invalid grandmother.

191. On October 5, 2011, Elsa Hall also called the police to arrest Yassin Hall rather than let her see her grandmother, but they declined to arrest her.

192. Since April 2011, and until she passed away on May 5, 2012, Plaintiff Samuel Hall and Yassin Hall were denied the ability to call Ethlyn Hall, visit her, wish her Happy Birthday or Happy Mother's Day or to determine whether she was properly being cared for. However, Elsa Hall, Phyllis Hall-Brin and Tanya Muldrow knew exactly where she was being kept and how to reach her.

193. Elsa Hall also failed to timely notify Samuel Hall and Yassin Hall of the death of Ethlyn Hall, leaving it to them to be notified by a friend who discovered it on Facebook.

194. Elsa Hall also attempted to deny Samuel Hall and Yassin Hall any involvement in the burial arrangements for Ethlyn Hall even though Elsa Hall and Phyllis Hall[-]Brin had no intention of attending and did not attend her funeral.

195. After Samuel Hall learned of the death of Ethlyn Hall, and offered Tanya Muldrow financial assistance with the burial costs, Tanya Muldrow threatened to cremate the remains of Ethlyn Hall unless Samuel Hall also paid for a burial vault for Ethlyn Hall, after he had already paid the funeral home for its services.

196. That threat was made for solely for the purpose of intentionally causing him emotional distress, and to permit Elsa Hall, Phyllis Hall-Brin and Tanya Muldrow to avoid paying any of the burial costs of Ethlyn Hall.

197. Elsa Hall individually plotted and planned and conspired to exercise dominion, control and ownership of Ethlyn Hall and her assets and her remains after using her undue influence on her while she was alive, and after isolating her while she was physically and mentally deteriorating, and incapable of taking care of herself and her affairs.

198. Elsa Hall was not motivated by love for Ethlyn Hall but by greed.

199. Elsa Hall and Phyllis Hall-Brin did not provide for the care of Ethlyn Hall prior to grabbing her and taking her out of her home in August 2010 just as they did not provide, attend to, care for, or honor their father during the last years of his life until he died in 2004,or provide for Ethlyn Hall after they took her out of her home in August 2010, except out of her own funds and income.

200. Elsa Hall and Phyllis Hall-Brin took advantage of Ethlyn Hall for their own economic benefit.

201. Purporting to act in the name of Ethlyn Hall, they attempted to obtain the construction funds under the Ground Lease which were allocated by Ethlyn Hall to the improvements to be made to Parcel 17-5 belonging to

Samuel Hall and Parcel 17-6 belonging to Yassin Hall.

202. Notwithstanding their attempts, the dwellings on Parcel 17-5 and 17-6 were successfully completed in 2010 and 2011.

203. At all material times, Elsa Hall and others combined, conspired and acted in concert to remove Ethlyn Hall from her home, isolate her from others, take advantage of her mental and physical deterioration, destroy her relationship with Samuel Hall and Yassin Hall and the children of Yassin Hall and deprive her of her property, to the detriment of Samuel Hall, Yassin Hall and the children of Yassin Hall, grandchildren of Ethlyn Hall, namely, Marik Young, Yamisha Young, Aubrey Warner, Jr., and Roumell Augustine.

COUNT I

BREACH OF FIDUCIARY DUTY

204. After taking advantage of Ethlyn Hall for years, on or after August 2010, Elsa Hall and others used their confidential relationship with Ethlyn Hall to exercise undue influence over her and take advantage of her, especially after she mentally and physically declined and then isolated her from the rest of her family and friends at a time when she could not walk, cook for herself, grocery shop, remember telephone numbers, or take care of herself or manage her own funds, and thus

became increasingly dependent on the assistance of others.

205. Because of the physical and mental infirmities of Ethlyn Hall, Elsa Hall and others have been able to take unfair advantage of Ethlyn Hall and to exercise undue influence over her and cause her to sign letters, a deed, Trust, and Will. Elsa Hall individually breached the duty of care she owed to her mother.

206. From and after August of 2010, Elsa Hall used and exerted undue influence on her mother while she was in her control, and Elsa Hall was in charge of Ethlyn Hall and the management and distribution of her income and property.

207. Since August 2010, she exercised complete dominion and control over the person of Ethlyn Hall as well as her income and property, and continues to control her property through the Trust.

208. Elsa Hall and others have failed to account for their stewardship of the welfare, income and property, or for their egregious behavior.

209. As Ethlyn Hall's agent and custodian, Elsa Hall owed her heirs a duty of loyalty and had a fiduciary duty to act in her best interest.

210. Elsa Hall and others breached their fiduciary duty to Ethlyn Hall by:

a. Seeking to take advantage of her dementia and paranoia;

b. presenting documents to her and telling her to sign them knowing that due to her mental infirmity she did not understand them or their legal consequence;

c. Keeping and spending her income for their own benefit;

d. failing to maintain adequate records of all transactions entered into on her behalf;

e. moving her out of her home;

f. causing her to transfer her assets into a Trust for their benefit three months after they moved her out of her home;

g. denying her the opportunity to go to her own son's funeral;

h. moving her to Florida away from the rest of her family and friends;

i. concealing her whereabouts from Samuel Hall, Yassin Hall and other members of her family and her friends;

j. attempting to place and rent out her storage shed on the beach without amenities or CZM approval in violation of law and risk fines and sanctions;

k. depriving her of the love and affection of her son, granddaughter and great-grandchildren;

l. wasting her savings and burial fund;

m. causing Ethlyn Hall to execute a Trust and a Will while she lacked the mental capacity to

do as a result of undue influence from Elsa Hall.

211. As a direct and proximate result of her wrongful actions in breach of her fiduciary duty owed to Ethlyn Hall, her mother, and to the rest of her family, Elsa Hall has caused damages and injuries to her mother's estate, and to Samuel Hall, Yassin Hall and other family members.

COUNT II

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

212. All allegations above are incorporated herein by reference as if set forth at length.

213. Elsa Hall and Phyllis Hall-Brin have acted willfully, wrongfully and maliciously to secret away, confine, and remove from the Virgin Islands, the person of Ethlyn Hall for the purpose of alienating her from Samuel Hall, denying him and Yassin Hall access to their mother and grandmother and otherwise to hold her under their dominion and control all to the detriment of Samuel Hall, Yassin Hall and others.

214. The removal of Ethlyn Hall, from the Virgin Islands, where she was born and has lived most of her life, including all of the past 52 years, was accomplished as a direct combination, plan and scheme of [ ] Elsa Hall and others.

215. Prior to the removal of Ethlyn Hall from the Virgin Islands, the last time she had flown on an airplane was to attend the graduation from law school of Plaintiff Samuel Hall in 1975.

216. Elsa Hall and Phyllis Hall-Brin, by removing Ethlyn Hall from St. John, Virgin Islands and attempting to establish a new domicile in Florida subjected her person and her estate to potentially substantial tax liabilities for which she and her estate would not otherwise be liable, all to the damage of Ethlyn Hall, her estate, and her heirs.

217. As a person born in the Virgin Islands and resident in the Virgin Islands, Ethlyn Hall's estate would not be subject to federal estate taxes, but that is not true if she is removed from the Virgin Islands and domiciled in Florida.

218. The removal of Ethlyn Hall from the Virgin Islands was accomplished with the motive to control her, isolate her, exert undue influence over her and to otherwise interfere with the relationship she had with Samuel Hall and Yassin Hall.

219. All of the actions of Elsa Hall were calculated to isolate and control Ethlyn Hall, her person and estate, all to the pecuniary advantage of Elsa Hall, and others, in favor of those individuals Elsa Hall wished to benefit, to the detriment of Samuel Hall, Yassin Hall and others.

220. In furtherance of their plan, scheme and design, they combined to overreach and overcome the will of Ethlyn Hall by moving her out of her home in August 2010 and then causing her to form a Trust of her assets three months later, in November 2010, without the knowledge and consent of Samuel Hall and Yassin Hall that will ultimately and fraudulently benefit them to the detriment of Samuel Hall, Yassin Hall and their heirs.

221. In furtherance of their plan, scheme and design, Elsa Hall and others have controlled all rental and other income that would otherwise be payable to Ethlyn Hall, and appropriated these amounts to their own use and benefit while using her lack of resources as part of the false justification for having moved her to Florida.

222. In furtherance of their plan, scheme and design, they deliberately sought to cause Samuel Hall and Yassin Hall to worry about the health and well-being of Ethlyn Hall until she passed away.

223. Their willful, wrongful, intentional and calculated acts have been purposefully designed to drive a wedge between mother and son, and granddaughter and grandmother, and to wrongfully deny them the attention, time, association, contact, love and affection of Ethlyn Hall solely to advance their greed, avarice and pecuniary interest.

224. Their willful, wrongful, intentional and calculated acts have been purposefully designed

to alienate Ethlyn Hall from her son and granddaughter, Yassin Hall, and the children of Yassin Hall and to wrongfully deny Yassin Hall and her children the attention, time, association, contact, love and affection of her grandmother, all to their detriment and solely to advance their own greed, avarice and pecuniary interest.

225. The conduct of Elsa Hall and others was intended to and did cause Samuel Hall and Yassin Hall and others emotional distress.

226. As a direct and proximate result of their wrongful conduct, Samuel Hall suffered emotional distress, pain of the mind and body, mental anguish, loss of sleep, and other physical symptoms, all to their detriment.

COUNT III

FRAUD

227. All allegations above are incorporated herein by reference as if set forth at length.

228. By sending out letters and emails to Samuel Hall through the use of U.S. mail, by fax and by email, purporting to be from Ethlyn Hall, who they are not, Elsa Hall committed fraud against the Plaintiff.

229. Elsa Hall sent letters, email and faxes fraudulently to Samuel Hall in order to (a) obtain money from him under false pretenses, and (b) prevent him from fulfilling his commitment to his mother to see to the completion

of the cottage of Yassin Hall, and (d) discourage him from looking out for his mother's best interests, and (e) to deprive him of his inheritance from his mother.

230. Elsa Hall also through the execution of the Will and Trust sought to benefit herself to the detriment of Plaintiff and Ethlyn Hall's other heirs. Elsa Hall's fraudulent conduct caused Ethlyn Hall in reliance thereon to move to Miami to her detriment and to the detriment of Samuel Hall, Yassin Hall and others, and to execute leases, will and trust documents [] contrary to her own interests and those of Plaintiff and others.

231. Elsa Hall continues to this date to fraudulently pursue a related case against Plaintiff when she knows of her own personal knowledge that there is no valid cause of action against Plaintiff.

232. Elsa Hall's conduct has been outrageous.

233. Samuel Hall is entitled to punitive damages as a result of her outrageous conduct.

COUNT IV

CIVIL CONSPIRACY/TORTIOUS INTERFERENCE

234. All allegations above are incorporated herein by reference as if set forth at length.

235. Elsa Hall, Phyllis Hall-Brin and others have combined, agreed, conspired, planned and

acted in such a way as to wrongfully, intentionally, and tortiously interfer with the relationship that Samuel Hall had with his mother, by denying him access to Ethlyn Hall and removing her from the Virgin Islands and causing her to sign leases, will, powers of attorney, contracts for the sale of real property and other documents, knowing that her physical and mental condition has been impaired due to her advanced age and the undue influence of Elsa Hall.

236. Elsa Hall and others combined, agreed, conspired, planned and acted in such a way as to wrongfully, intentionally, and tortiously interfered with the relationship that Yassin Hall had with her grandmother, by denying her access to Ethlyn Hall and removing her from the Virgin Islands, knowing that her physical and mental condition was impaired due to her advanced age and the undue influence of the Plaintiffs.

237. Elsa Hall is liable to Samuel Hall and Yassin Hall for tortious interference with their relationship with Ethlyn Hall and the inheritance they would have received from Ethlyn Hall but for the wrongful conduct of Elsa Hall.

238. As a direct and proximate result of the wrongful conduct of Elsa Hall and others, they have caused or attempted to cause Samuel Hall and Yassin Hall and the children of Yassin Hall the loss of their inheritance from

Ethlyn Hall, as well [as] mental anguish, pain, and other damages.

COUNT V

CONVERSION

239. All allegations above are incorporated herein by reference as if set forth at length.

240. Elsa Hall converted the property of Ethlyn Hall and the inheritance of Samuel Hall and Yassin Hall to her own use.

241. As a direct and proximate result of said conversion, Elsa Hall is liable to Plaintiff and to the Estate of Ethlyn Hall.

COUNT VI

MANDATORY INJUNCTION

242. All allegations above are incorporated herein by reference as if set forth at length.

243. Ethlyn Hall, up to the date of her death, was within the possession, dominion and control of Elsa Hall such that due to her advanced age, Samuel Hall and others have been forever denied the affections of Ethlyn Hall by virtue of her actions.

244. After the passing of Ethlyn Hall, and even before she was laid to rest on May 26, 2012, Plaintiff Elsa Hall sought in Family Court to remove the notice of lis pendens placed on the property of Ethlyn Hall by Plaintiff

Samuel Hall in order to protect against its transfer by Elsa Hall.

245. Elsa Hall attempted its removal without ever consenting to or submitting to the jurisdiction of the Family Court.

246. On May 15, 2012, Elsa Hall sought to get the Family Court to cancel the notice of lis pendens so that the property of Ethlyn Hall could be transferred or conveyed to another.

247. To prevent future misconduct by the Defendant, the Court should invalidate or stay the implementation of the Trust and all other such documents purporting to benefit Elsa Hall and others and disfavor Samuel Hall and others as a result of the undue influence of Elsa Hall.

248. Unless this Court invalidates or stays the implementation of the Trust and other documents benefitting Elsa Hall and enjoins Elsa Hall individually, or through any affiliated individuals or entities from disposing or transferring the property of Ethlyn Hall, she will exploit the property for her own benefit.

249. Samuel Hall has no adequate remedy at law to assure that Elsa Hall and others will turn over to its rightful heirs the property of Ethlyn Hall they wrongfully obtained.

250. Samuel Hall and other heirs of Ethlyn Hall will suffer and have suffered irreparable injury if Elsa Hall succeeds in selling the property of Ethlyn Hall.

251. Money damages are inadequate to compensate Samuel Hall and Yassin Hall for the loss of their inheritance in real property that has been in their family for generations unless the Court enjoins the wrongful conduct of Elsa Hall and others.

252. Plaintiff Samuel Hall is entitled to mandatory injunctive relief requiring Elsa Hall, individually to return to the estate of Ethlyn Hall her property wrongfully taken from her.

COUNT VII

ACCOUNTING

253. All allegations above are incorporated herein by reference as if set forth at length.

254. Elsa Hall and the Trust have received funds and property as described above, in an unknown amount, which was the property of Ethlyn Hall.

255. Elsa Hall has placed some of those funds in her own personal bank accounts and obtained long-term leases in her own name and in the name of a corporation she owns, Botanical Villas, Inc. to the property of Ethlyn Hall.

256. Plaintiff Samuel Hall requires this Court's intervention to order her to provide an accounting of all transactions by Elsa Hall concerning Ethlyn Hall's property and income that has been in her care, custody and control.

COUNT VIII

CONSTRUCTIVE TRUST

257. All allegations above are incorporated herein by reference as if set forth at length.

258. By reason of the wrongful manner in which Elsa Hall obtained and converted money and property belonging to Ethlyn Hall for her personal benefit she and the Trust should be required to disgorge themselves of that income and property and be directed to place said property and all profits and improvements therefrom in constructive trust for the heirs at law and next of kin of Ethlyn Hall.

259. In the meantime, Samuel Hall, Yassin Hall and her children are entitled to the imposition of an equitable lien on the property of Ethlyn Hall.

COUNT IX

TORTIOUS INTERFERENCE

260. All allegations above are incorporated herein by reference as if set forth at length.

261. By fraud and undue influence, Elsa Hall induced the mother and grandmother, respectively, of Samuel Hall and Yassin Hall, while she was 94 years old, in ill health, of unsound mind and isolated from them, to transfer to the Trust her valuable property, in an attempt to cause her to disinherit Samuel Hall and Yassin Hall.

262. Elsa Hall tortiously interfered in the relationship between Plaintiff Samuel Hall and Yassin Hall, on the one hand, with Ethlyn Hall on the other and caused a wrongful interference with and deprivation of their intended legacy.

263. That tortious interference was discovered in January 2013 when Plaintiff was provided with a copy of the Will and the Trust.

264. But for Elsa Hall's fraud and undue influence upon Ethlyn Hall, Plaintiff Samuel Hall and Yassin Hall as heirs at law of Ethlyn Hall would receive an inheritance from Ethlyn Hall, which, by virtue of Elsa Hall's tortious conduct, she has sought to prevent.

265. As a direct and proximate result of Elsa Hall's wrongful conduct, Samuel Hall has sustained damages.

WHEREFORE Plaintiff prays for judgment against Defendant for compensatory and punitive damages as may be proven at trial, and for injunctive relief as follows:

a. Requiring Defendant to return to the estate of Ethlyn Hall her property she wrongfully took from her mother and which would thereby constitute the inheritance of Plaintiff Hall and Yassin Hall

b. Enjoining Defendant from wasting the assets of Ethlyn Hall and requiring Defendant to account for her mother's assets in her possession or converted by her;

c. Removing Elsa Hall as trustee of the Trust;

c. Requiring Defendant to account for the income and property of Ethlyn Hall;

d. Imposing a constructive trust;

e. Invalidating or staying implementation of the Trust and disgorging from Elsa Hall and the Trust and others, the money and property belonging to Ethlyn Hall and placing said property and all profits therefrom in constructive trust for the heirs at law and next of kin of Ethlyn Hall;

f. Such and further relief as to the Court may seem just, equitable and proper.

Respectfully submitted,

DATED: December 16, 2013

s/ Samuel H. Hall, Jr.
Samuel H. Hall, Jr.
V.I. Bar No. 289
Marie Thomas Griffith
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IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ETHLYN LOUISE HALL, Individually, and ETHLYN LOUISE HALL, as Trustee of the Ethlyn Louise Hall Family Trust,	) CIVIL ACTION) 3:11-CV-54
Plaintiffs,	
v.	
SAMUEL H. HALL, JR. and HALL & GRIFFITH, P.C.,	
Defendants.	

REPORTER'S TRANSCRIPT

FURTHER PROCEEDINGS

(Under separate cover from 1/12/15 trial transcript)

January 12, 2015

BEFORE: THE HONORABLE
CURTIS V. GOMEZ
District Judge

APPEARANCES: ANDREW C. SIMPSON, ESQ.
EMILY A. SHOUP, ESQ.
Law Office of Andrew C. Simpson
2191 Church Street, Suite 5
Christiansted, VI 00820

---

* * *

[8] BY THE COURT:

Now, let me hear you on the claims, the counterclaims that are asserted.

Because I have some doubts, as I think I indicated, and I asked the parties to brief on that, that issue. That is, in the malpractice action there were counterclaims that were asserted. I believe I asked the parties to brief that.

There was a concern by the Court as to whether they are viable claims. I think in the response by Elsa Hall there was a motion for relief pursuant to 12(c). The Court indicated its concerns in, according to 12(b).

And part of the reason for the Court's concern is because the claims are – the counterclaims, that is, in the malpractice action are asserted against – yeah, the counterclaims are asserted against a representative whose representative capacity wasn't initiated until the death of the – well, the decedent here, Ms. Ethlyn Hall, which didn't occur until May of 2012 or thereabouts. Yet there are numerous allegations, all of which seem dependent on conduct that occurred prior to the existence of the representative capacity of Elsa Hall.

[9] In any event, there is a 12(c) petition before the Court. The Court had 12(b) concerns with it. I'm inclined to dismiss all of the counterclaims, but I want to give you a chance to be heard –

MR. SIMPSON: Your Honor, just one housekeeping matter? May I turn my computer on?

THE COURT: As long as the communication portion of it is not on.

MR. SIMPSON: Understood, yes.

THE COURT: And that applies to everyone. Yes, Attorney King?

MR. KING: Yes, I will try.

Your Honor, as I understand the portion of the representative capacity, and Your Honor has cited to specific dates, the representative capacity, as I understand it, not only deals with her as the representative of the estate who is the plaintiff, but also being a representative who is acting under powers of attorney that existed from, I believe, November 2010 and were continued on until the trust, which was established in February, sometime in February or March 2011, and continued on to the new trust, which was created in, in Florida.

The representative capacity – she acted in a representative capacity on behalf of not just the trust, [10] but on behalf of, supposedly, Elsa Hall – excuse me – Ethlyn Hall. And to that extent, that is why the representative capacity should still survive.

THE COURT: Right.

Attorney King, you can only assert a counterclaim against a party that has initiated a claim against you as a starting point, correct?

MR. KING: As a starting point, yes.

THE COURT: All right. Now as a starting point, the claimant here is Elsa Hall as personal representative and as trustee. She didn't become personal representative until the death of Ethlyn Hall, correct?

MR. KING: That is correct.

THE COURT: She didn't become trustee until the successor provision of the trust kicked in, which was on the death of Ethlyn Hall, correct?

MR. KING: Well the successor – yes, it did. Yes, that's correct.

THE COURT: All right. So that means she, Elsa Hall, didn't exist as a representative, either of the estate or of the trust, as a trustee, until the death of Ethlyn Hall.

MR. KING: That is absolutely correct.

THE COURT: All right. That is the only person [11] that is suing Samuel Hall and Hall and Griffith in the malpractice action?

MR. KING: That is true.

THE COURT: What you just said is your claim is against someone who didn't exist.

MR. KING: I understand what you're – where you're going, Your Honor. And I admit that that was wrong. I am wrong. You are absolutely correct.

THE COURT: So I'm inclined to – I'm going to dismiss all of the counterclaims and have a written opinion on that.

So what we have, then, is – I know the Court had raised some concerns about a third-party complaint. The Court doesn't find that there's a sufficient equal basis to regard what, in some papers was referred as to a third-party complaint.

So the Court doesn't find that there's been any leave, any proper assertion of a third-party complaint. So there is no third-party complaint.

So that leaves us in the malpractice action with the claims asserted by the representative.

* * *

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ELSA HALL as PERSONAL REPRESENTATIVE of the ESTATE OF ETHLYN LOUIS HALL, and ELSA Hall as TRUSTEE of the ETHLYN LOUISE HALL FAMILY TRUST,	**Civil No. 2011-54**
Plaintiff,	
v.	
SAMUEL H. HALL, Jr. and HALL & GRIFFITH, P.C.,	
Defendants.	
SAMUEL H. HALL, Jr.,	**Civil No. 2013-95**
Plaintiff,	
v.	
ELSA HALL,	
Defendant.	

ATTORNEYS:

Andrew C. Simpson, Esq.
Emily A. Shoup, Esq.
Law Offices of Andrew Simpson
St. Croix, U.S.V.I.
For Elsa Emily Hall in her representative capacity and as trustee.

Carl A. Beckstedt, III, Esq.
Beckstedt and Associate
St. Thomas, U.S.V.I.
For Elsa Emily Hall in her personal capacity.

Robert L. King, Esq.
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St. Thomas, U.S.V.I.
For Samuel Hall and Hall and Griffith, PC.

Marie E. Thomas-Griffith, Esq.
Hall & Griffith, P.C., PC.
St. Thomas, U.S.V.I.
For Samuel Hall and Hall and Griffith, PC.

VERDICT FORM

(Filed Jan 15, 2015)

PART ONE: CLAIMS ASSERTED BY ELSA HALL, IN HER REPRESENTATIVE CAPACITY

BREACH OF FIDUCIARY DUTY ARISING OUT OF AN ATTORNEY-CLIENT RELATIONSHIP WITH RESPECT TO HALL & GRIFFITH, P.C.

Question 1.

Do you find, by a preponderance of the evidence, that Hall & Griffith, P.C. breached a fiduciary duty arising out of an attorney-client relationship with Ethlyn Hall?

Yes	No
	✓

If your answer to Question 1 is "no," then please proceed to Question 3. If your answer to Question 1 is "yes," then please proceed to Question 2.

Question 2.

Do you find, by a preponderance of the evidence, that Hall & Griffith, P.C.'s breach of fiduciary duty was a proximate cause of some injury to Ethlyn Hall?

Yes	No
_____	_____

BREACH OF FIDUCIARY DUTY ARISING OUT OF AN ATTORNEY-CLIENT RELATIONSHIP WITH RESPECT TO SAMUEL HALL

Question 3.

Do you find, by a preponderance of the evidence, that Samuel Hall breached a fiduciary duty arising out of an attorney-client relationship with Ethlyn Hall?

Yes	No
_____	✓

If your answer to Question 3 is "no," then please proceed to Question 5. If your answer to Question 3 is "yes," then please proceed to Question 4.

Question 4.

Do you find, by a preponderance of the evidence, that Samuel Hall's breach of fiduciary duty was a proximate cause of some injury to Ethlyn Hall?

Yes	No
_____	_____

BREACH OF FIDUCIARY DUTY ARISING OUT OF A POWER OF ATTORNEY WITH RESPECT TO SAMUEL HALL

Question 5.

Do you find, by a preponderance of the evidence, that Samuel Hall breached a fiduciary duty arising out of a power of attorney granted by Ethlyn Hall?

Yes	No
_____	✓

If your answer to Question 5 is "no," then please proceed to Question 7. If your answer to Question 5 is "yes," then please proceed to Question 6.

Question 6.

Do you find, by a preponderance of the evidence, that Samuel Hall's breach of fiduciary duty was a proximate cause of some injury to Ethlyn Hall?

Yes	No
_____	_____

FRAUD COMMITTED BY SAMUEL HALL

Question 7.

Do you find, by a preponderance of the evidence, that Samuel Hall defrauded Ethlyn Hall?

Yes	No
	✓

If your answer to Question 7 is "no", then please proceed to Question 9. If your answer to Question 7 is "yes," then please proceed to Question 8.

Question 8.

Do you find, by a preponderance of the evidence, that Samuel Hall's fraud was a proximate cause of some injury to Ethlyn Hall?

Yes	No

UNJUST ENRICHMENT BY SAMUEL HALL

Question 9.

Do you find, by a preponderance of the evidence, that Samuel Hall was unjustly enriched at Ethly Hall's expense?

Yes	No
	✓

PART TWO: CLAIM ASSERTED BY SAMUEL HALL

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY ELSA HALL

Question 10.

Do you find, by a preponderance of the evidence, that Elsa Hall, in her individual capacity, intentionally inflicted emotional distress on Samuel Hall?

✓	
Yes	No

If your answer to Question 10 is "no," then skip question 11. If your answer to Question 10 is "yes," then please proceed to question 11.

Question 11.

Do you find, by a preponderance of the evidence, that Elsa Hall intentionally inflicted emotional distress on Samuel Hall was a proximate cause of some injury to Samuel Hall?

✓	
Yes	No

PART THREE: DAMAGES WITH RESPECT TO CLAIMS ASSERTED BY ELSA HALL, IN HER REPRESENTATIVE CAPACITY

BREACH OF FIDUCIARY DUTY WITH RESPECT TO HALL & GRIFFITH, P.C.

Only answer Question 12 if you answered yes to Question 2.

Question 12.

What amount of compensatory damages, if any, do you find, by a preponderance of the evidence, that Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust, is entitled to from Hall & Griffith, P.C.?

_____

BREACH OF FIDUCIARY DUTY WITH RESPECT TO SAMUEL HALL

Only answer Question 13 and Question 14 if you answered "yes" to Question 4 or Question 6.

Question 13.

What amount of compensatory damages, if any, do you find, by a preponderance of the evidence, that Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise

Hall Family Trust, is entitled to from Samuel Hall?

_____

Question 14.

What amount of punitive damages, if any, do you find, by clear and convincing evidence, that Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust, is entitled to from Samuel Hall?

_____

FRAUD

Only answer Question 15 and Question 16 if you answered "yes" to Question 8.

Question 15.

What amount of compensatory damages, if any, do you find, by a preponderance of the evidence, that Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust, is entitled to from Samuel Hall?

_____

Question 16.

What amount of punitive damages, if any, do you find, by clear and convincing evidence, that Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust, is entitled to from Samuel Hall?

_____

UNJUST ENRICHMENT WITH RESPECT TO SAMUEL HALL

Only answer Question 17 if you answered "yes" to Question 9.

Question 17.

What amount of restitution, if any, do you find, by a preponderance of the evidence, that Elsa Hall, as Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust, is entitled to from Samuel Hall?

_____

PART FOUR: DAMAGES WITH RESPECT TO CLAIMS ASSERTED BY SAMUEL HALL

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WITH RESPECT TO ELSA HALL

Only answer Question 18 and Question 19 if you answered "yes" to Question 11.

Question 18.

What amount of compensatory damages, if any, do you find, by a preponderance of the evidence, that Samuel Hall is entitled to from Elsa Hall, in her individual capacity?

$500,000.00

Question 19.

What amount of punitive damages, if any, do you find, by clear and convincing evidence, that Samuel Hall is entitled to from Elsa Hall, in her individual capacity?

$1,500,000.00

[Signatures And Names Of Jurors Omitted]

DATED this 15th day of January, 2015.

No. 16-1150

In The Supreme Court of the United States

ELSA HALL,
As Personal Representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The deadline for filing an appeal is a "mandatory claims processing rule" that "must be enforced" "if properly invoked." *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658, 2017 WL 5160782 (Nov. 8, 2017) (slip op. at 3). Though the deadline is not jurisdictional, missing the deadline can result in the loss of an appeal. Therefore, the deadline "should above all be clear." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). The deadline is measured from the entry of final judgment. Fed. R. App. P. 4.

In *Gelboim v. Bank of Am. Corp.*,135 S.Ct. 897, 905 (2015), the Court held that in cases consolidated in multidistrict litigation ("MDL"), a final judgment in a single case triggers the "appeal-clock" for that case (rather than a final judgment entered in another case consolidated in the MDL proceeding). However, the Court limited its holding to MDL consolidations and declined to decide whether that same bright line rule should apply to cases consolidated in a single district under Fed. R. Civ. P. 42. *Gelboim*, 135 S.Ct. at 904 n.4. In the case below, the Third Circuit dismissed petitioner's appeal from a final judgment because it was consolidated under Fed. R. Civ. P. 42 with a case that was not final. Thus, the Question Presented raises the issue left undecided in *Gelboim*:

> Should the clarity *Gelboim* gave to multidistrict consolidated cases be extended to single district consolidated cases, so that the entry of a final judgment in only one case triggers the appeal-clock for that case?

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Argument. 8

A. A court of appeals "shall" have jurisdiction over a final decision of a district court. 28 U.S.C. § 1291. Petitioner filed a timely appeal from an order dismissing her case. The Third Circuit erred when it concluded that it did not have jurisdiction. 8

B. Allowing appeals from final judgments in consolidated cases does not force the courts of appeals to decide piecemeal appeals. 12

C. Fed. R. Civ. P. 54(b) permits a court to certify for interlocutory appeal a judgment as to one, "but fewer than all" claims. Here, the judgment dismissed all of petitioner's claims. The Third Circuit erred when it concluded that petitioner could have sought certification via a Rule 54(b) appeal. 16

1. Rule 54(b) does not apply when a case is completely dismissed.. 16

2. Consolidated cases are not merged into a single action. 17

a. Historically, this Court recognized that consolidated cases were not merged and were separately appealable. 18

b. Numerous and varied applications of the Federal Rules of Civil Procedure establish that Rule 42 does not result in the merger of actions 19

D. Litigants need a uniform rule that clearly identifies when appellate jurisdiction attaches. The final judgment rule provides the best rule: It is clear; it is consistent with Section 1291 and *Gelboim*; and it still allows the circuits the flexibility to manage their dockets to avoid piecemeal appeals. 21

1. The current approach taken by the majority of the circuits creates too much uncertainty as to when to appeal. 22

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3. The court should adopt the same rule that it adopted in *Gelboim*. 24

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CITATION TO OPINION BELOW

The Third Circuit Court of Appeals decision is found at 679 Fed. App'x 142.

JURISDICTION

The Third Circuit entered its decision on February 10, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Third Circuit's decision on a writ of certiorari. A timely petition for writ of certiorari was filed on March 17, 2017. This Court granted the petition on September 28, 2017.

STATUTORY PROVISION AT ISSUE

28 U.S.C. § 1291 provides, in relevant part:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . and the District Court of the Virgin Islands . . . ."

STATEMENT OF THE CASE

In May 2011, Ethlyn Hall ("Mrs. Hall") sued her son, Samuel H. Hall, Jr. ("Samuel"), and his law firm, Hall and Griffith, PC, (collectively "respondents") for conversion, malpractice, fraud and related torts. Doc. No. 1.[1] The primary focus of the lawsuit was approxi-

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[1] Unless otherwise indicated, "Doc. No." refers to the document number assigned to a document by the District Court of the Virgin Islands Electronic Case Filing System in Case No. 3:11-cv-00054. References to documents filed in Case No. 3:13-cv-00095 are indicated by "(in 13-95)" following the document number.

mately one million dollars in rent that Samuel collected on behalf of his mother. Samuel claimed that he had his mother's permission to use a substantial portion of this money to build an expensive vacation rental property on St. John, U.S. Virgin Islands. JA-50, ¶37. Mrs. Hall asserted that Samuel had converted the money and demanded it back. JA-25, ¶¶44-52, 79-87.

Mrs. Hall sued in her individual capacity and in her capacity as the trustee of her *inter vivos* trust. Doc. No. 1. The case was filed in the District Court of the Virgin Islands as Case No. 3:11-cv-00054 ("11-54").

The progress of the case was delayed by procedural motions and during that delay, Mrs. Hall died. Pet. App'x A-4. Mrs. Hall's daughter, Elsa Hall ("Elsa"), in her representative capacities as the administrator of Mrs. Hall's estate and the successor trustee of Mrs. Hall's trust, was substituted as plaintiff by means of an amendment to the complaint filed in January 2013. JA-17. The respondents answered the amended complaint (JA-45) and asserted various defenses, including a claim that Mrs. Hall's testamentary documents were procured by Elsa through undue influence on Mrs. Hall. JA-60. Included with the answer was a counterclaim (JA-61) asserted solely by Samuel against Elsa in her representative capacities;[2]

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[2] The counterclaim was ostensibly against Elsa in both her representative and individual capacities. But, since Elsa was not a plaintiff in her individual capacity, there was no basis to file a counterclaim against her individually. *See, e.g., Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966) (holding that a person suing in a representative capacity is "regarded as a person distinct from the same person in his individual capacity and is a

however, he alleged conduct that could only have occurred while Mrs. Hall was alive (*e.g.*, exercising undue influence over Mrs. Hall in the creation of her testamentary documents and alienating the relationship between Mrs. Hall and Samuel). As Elsa only assumed the representative capacity roles after Mrs. Hall died, she could not have committed these acts in a representative capacity.[3]

Presumably because he recognized the deficiencies in the counterclaim, Samuel eventually filed a separate complaint in the District Court of the Virgin Islands against Elsa individually. (Case No. 3:13-cv-00095) ("13-95"). That complaint, as amended (JA-108), made the same allegations against Elsa in her individual capacity that Samuel had previously made against her in her representative capacities in the counterclaim (JA-61) in 11-54.

Samuel moved, in 13-95 only, to consolidate that case with 11-54. Doc. No. 11 (in 13-95). The basis

---

stranger to his rights or liabilities as an individual"). In a January 12, 2015 bench ruling, the district court recognized that the counterclaim against Elsa in her individual capacity was properly styled as a third party complaint; but, because leave to file a third party complaint was never obtained, the court dismissed the the claim against Elsa individually. JA-160, JA-162.

[3] On January 12, 2015, the morning of the first day of trial, Samuel conceded that the counterclaim against Elsa in her representative capacities was not viable because the actions alleged against her occurred before she began to act in a representative capacity. JA-161. The district court therefore dismissed the counterclaim. JA-162.

Samuel asserted for the consolidation was the similarity of the allegations in Samuel's counterclaim in 11-54 (which had not yet been dismissed) with the allegations in Samuel's complaint in 13-95. On February 14, 2014, the district court granted the motion; however, the order did not specify whether the consolidation was for discovery, for trial, or for all purposes. Pet. App'x A-14. Throughout the litigation, separate counsel represented Elsa in her two different capacities.

As the cases neared the scheduled January 2015 trial, the nature of the cases evolved. Samuel had filed a proceeding in the probate court in Florida (Mrs. Hall's final domicile) seeking revocation of Mrs. Hall's will and trust based upon his claim that Elsa had used undue influence to procure Mrs. Hall's testamentary documents. *See Hall v. Hall*, 190 So.3d 683, 684-85 (Fla. Dist. Ct. App. 2016) (describing proceedings in the probate court). On November 14, 2014, the probate court entered an order denying the petition to revoke the probate of the will and trust. Doc. No. 321-1.[4]

There were no shared issues between petitioner's claim against Samuel in 11-54 and Samuel's affirmative claims. The only reason there was an issue argu-

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[4] The order was affirmed on appeal with the appellate court holding that the record established "that the challenged documents were properly executed, that they were prepared at the request of the decedent, and that they were not actively procured by the appellee (a daughter) [Elsa] serving as personal representative under the will. The appellee established that she was not a substantial beneficiary under the trust." *Hall*, 190 So.3d at 685.

ably in common between the two cases was because Samuel made the same claim that Elsa exercised undue influence over his mother (1) as an affirmative defense in 11-54; (2) as an improperly asserted counterclaim in 11-54; and (3) in his complaint against Elsa in 13-95.[5] The collateral effect of the Florida probate court's order eliminated undue influence as an issue in the proceedings in the Virgin Islands and thus eliminated the only issue in common with Samuel's affirmative defense to petitioner's claim and his own claims against Elsa.

Forty days after the Florida probate court entered its order, Elsa in her representative capacities moved to sever the two Virgin Islands cases on the grounds that there were few overlapping facts and that the jurors would be confused and unable to distinguish between Elsa in her representative capacities (seeking to vindicate her mother's claims against Samuel for breach of fiduciary and related duties) and Elsa in her individual capacity (defending the claim by Samuel that she had caused the estrangement between Samuel and their mother). Doc. No. 177. The trial court never ruled on that motion and the cases were tried together.

---

[5] Samuel raised undue influence as an affirmative defense (JA-60, ¶6) to petitioner's claim in 11-54 because, if he was successful in proving undue influence, Elsa would be removed as the personal representative/trustee and someone else would control the lawsuit against Samuel. He asserted undue influence in his counterclaim (11-54) and first amended complaint (13-95) to argue, *inter alia*, that he was entitled to a share of his mother's estate because he had been disinherited by Mrs. Hall as a result of undue influence. *See* JA-105, ¶251 (counterclaim) and JA-154, ¶261 (first amended complaint).

At the start of the trial, the district court concluded that major portions of Mrs. Hall's claims (including the conversion claim) did not survive her death and dismissed them *sua sponte*. Doc. No. 423 at 11. The jury returned a verdict against petitioner on the few remaining claims. JA-164. The jury also returned a verdict against Elsa in her individual capacity, awarding Samuel $500,000 in compensatory damages and $1.5 million in punitive damages. JA-172.

On February 4, 2015, the court entered separate final judgments in each case. In 11-54, the judgment specified that "the plaintiff recover nothing [and] the action be dismissed on the merits." Pet. App'x A-12.

On March 4, 2015, Elsa filed a motion for a new trial in the case against her individually. Doc. No. 289 (in 13-95). The following day, petitioner filed a timely notice of appeal in 11-54 to the United States Court of Appeals for the Third Circuit. Doc. No. 426.

Respondents moved to dismiss the appeal, asserting that the final judgment entered in 11-54 was not final because there was not yet a final judgment in 13-95 (due to the pendency of the Fed. R. Civ. P. 59 motion for new trial filed in that case). JA-13 (relevant docket entries). Initially, the Third Circuit placed the appeal on suspense, waiting to see what transpired with the motion for new trial in the companion case. *Id.*

A year later, on March 30, 2016, the district court granted the motion for new trial in 13-95 and vacated the verdict against Elsa individually. JA-315. The Third Circuit thereafter decided to move forward with the appeal in 11-54. JA-15 (relevant docket entries).

After full briefing, the court heard oral argument on December 12, 2016. *Id.* On February 10, 2017, the Third Circuit dismissed the appeal for lack of appellate jurisdiction. Pet. App'x A-1 and A-10.

The new trial against Elsa in her individual capacity commenced on April 5, 2017. Doc. No. 407 (in 13-95). At the conclusion of Samuel's case, Elsa moved for a mistrial and for judgment as a matter of law. Doc. No. 408 (in 13-95). The court took those motions under advisement and Elsa then rested without putting on a case. The jury returned a verdict against Elsa (Doc. No. 417 (in 13-95)); however, the district court still has the pre-verdict motions under advisement and therefore has not entered judgment on the jury verdict. If the trial court denies the pending motions and enters judgment against Elsa, she will renew the motion for judgment as a matter of law and file a motion for new trial in accordance with Fed. R. Civ. P. 59.

SUMMARY OF ARGUMENT

The appellate jurisdiction statute, 28 U.S.C. § 1291, unambiguously authorizes an appeal from a final judgment. A losing party has a right of appeal from a final judgment, even if its case is consolidated with another case that is not final. All but two of the courts of appeals have ignored the plain language of Section 1291, primarily because they perceive a need to avoid piecemeal appeals arising from the consolidated cases. While concern about piecemeal appeals is valid in *some* instances, there are other tools available to the courts of appeals to allow them to address that concern while still following the statutory mandate that a party has a right of appeal from a final judgment.

ARGUMENT

An order dismissing a case in its entirety is a final decision appealable as of right under 28 U.S.C. § 1291. Section 1291 is not discretionary—it instructs that the courts of appeals "shall have jurisdiction" over final decisions. Here, petitioner's case was dismissed in its entirety. Consequently, the court of appeals erred when it dismissed petitioner's appeal for lack of jurisdiction.

A. A court of appeals "shall" have jurisdiction over a final decision of a district court. 28 U.S.C. § 1291. Petitioner filed a timely appeal from an order dismissing her case. The Third Circuit erred when it concluded that it did not have jurisdiction.

Petitioner's lawsuit was terminated when the district court entered a "Judgment in a Civil Action" that "ordered that . . . the plaintiff recover nothing, the action be dismissed on the merits." Pet. App'x A-12. This judgment terminated petitioner's entire action.

A judgment that terminates an action is a final decision. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). This Court's long-standing precedent establishes that a final decision is "one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 134 S. Ct. 773, 779 (2014); *Bostwick v. Brinkerhoff*, 106 U.S. 3, 4 (1882) (stating that "[i]f the judgment is not one which disposes of the whole case on its merits, it is not

final").[6]

Petitioner sought to appeal the dismissal pursuant to 28 U.S.C. § 1291, which mandates that "[t]he courts of appeals . . . *shall* have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . and the District Court of the Virgin Islands . . . ." (Emphasis added.) Section 1291 is not discretionary: "'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.'" *England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. 411, 415 (1964) (quoting *Willcox v. Consol. Gas Co. of New York*, 212 U.S. 19, 40 (1909)). "Recourse to the Court of Appeals is a matter of right" under Section 1291. *Heckler v. Edwards*, 465 U.S. 870, 876 (1984).

Despite the entry of a final judgment terminating the litigation and the command in Section 1291 that the court of appeals "shall" have jurisdiction over a final decision of a district court,[7] the Third Circuit dismissed petitioner's appeal for lack of jurisdiction. It dismissed the appeal even as it acknowledged that "ordinarily such a judgment would, of course, be appealable." Pet. App'x A-6. The court then stated the circuit's precedent that compelled this result: "When two cases have been consolidated for all purposes, a

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[6] Congress gave this Court the authority to "define when a ruling of a district court is final for purposes of appeal under Section 1291." 28 U.S.C. § 2072(c).

[7] The word "shall" usually connotes a requirement. *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016).

final decision on one set of claims is generally not appealable while the second set remains pending." Pet. App'x A-7 (citing *Bergman v. City of Atl. City*, 860 F.2d 560, 563 (3d Cir. 1988)). Instead, the Third Circuit considers the appealability of consolidated cases on a case-by-case basis. *Id.* at 566. But one factor under this case-by-case analysis—if the cases are consolidated for trial or all purposes—is considered "dispositive" and precludes an appeal until the entire consolidated proceeding is final. *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991).

The Third Circuit's case-by-case approach to the appealability of consolidated cases finds no support in 28 U.S.C. § 1291. Section 1291 does not carve out an exception to the final judgment rule in consolidated cases or give a court discretion to decide whether to take jurisdiction over an appeal. And, because Section 1291 is unambiguous, there is no basis to interpret it in a manner that is contrary to its plain meaning.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992). Thus, when interpreting a statute, this Court "always" starts with the statutory language. *Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652, 1658 (2017). If the statute is plain and unambiguous, the Court "must apply the statute according to its terms," *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); because, if the statute is plain and unambiguous, "this first canon is also the last: 'judicial

inquiry is complete.'" *Connecticut Nat. Bank*, 503 U.S. at 253 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Here, the "statute according to its terms" compelled the Third Circuit to take jurisdiction over petitioner's appeal.

The Third Circuit's case-by-case approach is also inconsistent with this Court's precedent. This Court has previously upheld appellate jurisdiction over an appeal from a final order in an individual case that was consolidated with another (non-final) case. *See United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-14 (1926) (holding that despite the grant of a new trial in one case, the judgments in cases consolidated with that case had "finality and completeness" such that they were reviewable in the court of appeals); *Withenbury v. United States*, 72 U.S. 819, 821 (1866) (accepting jurisdiction over appeals of parties whose claims "left nothing to be litigated" although other parties' claims were not yet final).[8]

The plain language of Section 1291 provides a bright line rule for when the "appeal-clock"[9] begins ticking: the date of entry of the final judgment against the party seeking to appeal. This Court should reinstate petitioner's appeal.

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[8] While these cases predate the codification of the final judgment rule in 28 U.S.C. § 1291, the final judgment rule has existed since the creation of the federal judiciary. *See generally Arizona v. Manypenny*, 451 U.S. 232, 245 n.19 (1981) (tracing the origins of final judgment rule to 1789).

[9] *Gelboim*, 135 S.Ct. at 905.

B. Allowing appeals from final judgments in consolidated cases does not force the courts of appeals to decide piecemeal appeals.

The Third Circuit's rule for appeals in consolidated cases is rooted in a concern that there will be piecemeal appeals from the various cases in a consolidated proceeding. See Pet. App'x A-9 ("we will not second guess [the district court's decision to consolidate] by allowing piecemeal appeals"); *see also Bergman*, 860 F.2d at 567 ("most importantly, the practice ignores the rule against piecemeal appeals . . ."). This same concern is often expressed by the other circuits that deny an immediate appeal from a final judgment in a consolidated case. *See, e.g. Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) ("[o]ur adoption of any other rule would lead to the same piecemeal review Rule 54(b) seeks to prevent"), *cert. denied*, 487 U.S. 1223 (1988); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("we do not believe that [the appellant's] personal interest in his action outweighs the public interest in promoting judicial economy by avoiding piecemeal appeals").

In appeals from *some* consolidated cases, the concern about piecemeal appeals is valid. For example, in *Watson v. Adams*, 642 Fed. App'x 240 (4th Cir. 2016), the plaintiff filed a wrongful death action against various defendants and then filed a separate survival action against the same defendants. Both cases arose from the same core of operative facts. The two cases could have been filed as one case. Indeed, after they were filed, they were consolidated by consent of the

parties. Subsequently, the district court granted summary judgment dismissing the wrongful death case but not the survival action. When Watson appealed, the Fourth Circuit dismissed the appeal for lack of jurisdiction, holding that Watson had to await final judgment in the survival action before he could appeal.

Few would disagree that under the above facts, Watson's appeal should await the final disposition of the survival action.[10] But, acknowledging that a problem exists does not require using a sledgehammer to kill a fly. Rather than dismissing an appeal for lack of jurisdiction, there are solutions available that respect the final judgment rule and yet allow the courts of appeals to deal with appeals from consolidated cases in an efficient manner.

One solution is for the courts of appeals to *manage*, rather than *dismiss*, appeals from cases that are consolidated at the district court level. Confronted with an appeal from a final order in one of several consolidated cases, the appellate court may consider whether to stay the appeal, pending resolution of the other, non-final, cases that were consolidated with the case on appeal.[11] This solution is far superior to the current

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[10] The *Watson* case falls within the category of cases described in footnote seven of *Gelboim*: an action "that could have been brought under the umbrella of one complaint." 135 S.Ct. at 906 n.7.

[11] When the first case is appealed, there is only one appeal pending and thus no other case on appeal to consolidate with it. Procedurally, the court of appeals should consider whether the first appeal should be stayed, pending final disposition of the

situation, because it allows the courts of appeals, rather than the district courts, to determine whether appeals should be consolidated.[12] Thus, a decision to consolidate an appeal would be based upon the posture of the cases at the time of the appeal instead of their posture at the time they were consolidated in the district court (typically early in the proceedings, when the allegations in the two cases that supported the

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consolidated proceeding in the trial court. In practice, one would expect the appellee to file a motion to stay the appeal and explain why the issues that remain before the district court make it appropriate to delay the appellant's right of appeal.

Logically, the determination whether to stay the appeal should consider a variety of factors, such as: (1) whether the issues in the first appeal are distinct from the issues likely to arise if the consolidated cases are appealed; (2) whether the cases in the consolidated proceeding could have been (or should have been) filed as a single case (*e.g.*, the classic race to the courthouse case where the two parties to a contract file separate complaints alleging the other party breached the contract); (3) whether resolution of a particular legal issue on appeal might materially advance the remaining litigation in the district court; and (4) the prejudice to the appellant caused by delaying its appeal.

[12] The courts of appeals have broad authority to consolidate appeals, "constrained only by the requirement that 'the parties have filed separate timely notices of appeal.' Fed. R. App. P. 3(b)(2)." *United States v. Williamson*, 706 F.3d 405, 418 n.9 (4th Cir. 2013). *See also Stone v. INS*, 514 U.S. 386, 401 (1995) (stating in *dicta* that "it would seem" that a court of appeals had the power to consolidate two appeals); *Good v. Fuji Fire & Marine Ins. Co.*, 271 Fed. App'x 756, 757 (10th Cir. 2008) (consolidating appeals and citing *Stone* to support consolidation).

consolidation are untested).[13] Under the various procedures for appeals from consolidated cases followed in all but the First and Sixth Circuits (as described in the Petition for Writ of Certiorari, at 6-9), a district court's decision to consolidate creates an anomalous situation that prevents the courts of appeals from considering whether the case should remain consolidated on appeal. The solution proposed by petitioner is true to 28 U.S.C. § 1291 and avoids the incongruity that allows a district court to control the consolidation of a case on appeal. Instead, it permits the courts of appeals to manage their own appeals and avoid, when appropriate, piecemeal appeals.

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[13] The consolidation in this case demonstrates the problem perfectly. The second case (13-95) was consolidated with the first (11-54) because the allegations in the first amended complaint in 13-95 mirrored the allegations in the counterclaim filed in 11-54. By the time of trial, however, the counterclaim in 11-54 was dismissed and the cases had little substantively in common. The issues that petitioner raised on appeal in this case (such as whether Mrs. Hall's claims survived her death) have no bearing on Samuel's claim against his sister Elsa in 13-95. Nevertheless, because of the district court's consolidation order, the Third Circuit was precluded (by its own precedent) from considering whether there was any reason to keep the cases consolidated on appeal.

C. Fed. R. Civ. P. 54(b) permits a court to certify for interlocutory appeal a judgment as to one, "but fewer than all" claims. Here, the judgment dismissed all of petitioner's claims. The Third Circuit erred when it concluded that petitioner could have sought certification via a Rule 54(b) appeal.

The Third Circuit opined that petitioner "could have sought Rule 54(b) certification yet chose not to do so." Pet. App'x A-9 n.11. Similarly, in opposing the petition, respondents asserted that a party wishing to appeal in a consolidated proceeding in which other cases were not yet final should seek a discretionary appeal through Rule 54(b) rather than availing itself of an appeal as of right. The plain language of Rule 54(b), however, establishes that an appeal under that rule was not an option available to petitioner.

1. Rule 54(b) does not apply when a case is completely dismissed.

Rule 54(b) applies to "an action" and authorizes a court to enter a final judgment "as to one or more, but fewer than all, claims or parties." As this Court has recognized, when a case is dismissed in its entirety, Section 1291 rather than Rule 54(b) provides the jurisdiction for an appeal:

> If Mackey's complaint had contained only Count I, there is no doubt that a judgment striking out that count and thus dismissing, in its entirety, the claim there stated would be both a final and an appealable decision within the meaning of

> §1291. Similarly, if his complaint had contained Counts I, II, III and IV, there is no doubt that a judgment striking out all four would be a final and appealable decision under § 1291.

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431 (1956).

Rule 54(b) only applies when a judgment is entered in "an action" as to "fewer than all" claims. Here, the district court entered a final judgment dismissing the entire case. Pet. App'x A-12. Just as in *Gelboim*, "Rule 54(b) is of no avail to" petitioner because "there is nothing 'interlocutory' about the dismissal order." *Gelboim*, 135 S.Ct. at 906. The plain language of Rule 54(b) is inapplicable to a case that is completely dismissed.

2. Consolidated cases are not merged into a single action.

Rule 54(b) would only be available to a party in petitioner's shoes *if* cases consolidated for trial under Fed. R. Civ. P. 42 are merged and become a single action—such that a dismissal in one case is not final until final judgments are entered in the action. However, this Court has held that consolidation does not merge cases into a single case. A change in that holding would have a widespread impact upon practice in the federal courts.

a. Historically, this Court recognized that consolidated cases were not merged and were separately appealable.

Prior to the adoption of the Federal Rules of Civil Procedure, this Court rejected the proposition that consolidation of cases resulted in the merger of the actions. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." (footnote omitted)). *See also Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 293 (1892) ("[A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct . . . .").

Consistent with the holding in *Johnson* that consolidation does not cause the merger of cases, this Court has ruled, at least twice before the Federal Rules of Civil Procedure were adobted, that a party may appeal when a final judgment is entered against it even though the party's case is consolidated with another case that is not final. *See River Rouge Improvement*, 269 U.S. at 413-14 and *Withenbury*, 72 U.S. at 821. If the new federal rules were intended to overrule this Court's settled-precedent, one would expect the Advisory Committee that helped develop those rules to call attention to the change. The Advisory Committee did exactly that with other rules changes that departed

from the pre-Rules practice;[14] but, there is nary a hint in the Report of the Advisory Committee on Rules for Civil Procedure (1937) suggesting any intent to depart from the above precedents allowing an immediate appeal from a final judgment entered in a consolidated case.

b. Numerous and varied applications of the Federal Rules of Civil Procedure establish that Rule 42 does not result in the merger of actions.

The way in which the Federal Rules of Civil Procedure operate would change significantly if Rule 42 is read to merge cases that are consolidated. Questions about how Rule 42 affects other aspects of the rules arise frequently. The courts, including this Court, consistently recognize that Rule 42 does not alter the status of an "action" and merge two actions into one and thereby change the procedures applicable to the individual actions. Examples of this abound in the case law. For example:

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[14] Even when the adoption of the new federal rules resulted in a minor change in existing practice, the Advisory Committee highlighted the change. *See, e.g.*, Report of the Advisory Committee on Rules of Civil Procedure (1937), Rule 4, Note to Subdivision (f): "This rule enlarges to some extent the present rule . . . ." *See also id.*, Rule 18, Note to Subdivision (a) (describing modern trends and indicating that the rule "broad[ens] existing practice"). And, when the new rules were departing from practices previously authorized by federal statute, the Advisory Committee did not hesitate to acknowledge the change: "These statutes are superseded insofar as they differ from this and subsequent rules." *Id.*, Rule 26, Note to Subdivision (a).

- This Court requires that—despite consolidation of cases in the district court—"[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976); *accord Cole v. Schenley Industries, Inc.*, 563 F.2d 35, 38 (2d Cir. 1977).

- Improper service of a defendant in one case is not cured by consolidating that case with another case in which the same defendant was properly served. *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.).

- A plaintiff may dismiss "an action" without a court order by securing a stipulation of dismissal "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). The plaintiff does not need to secure the signatures of parties who have appeared in the other actions subject to a consolidation order. *United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984).

- Consolidation does not merge cases and the cases retain their independent status such that the parties to one action can settle it independently of the other. *State Mutual Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979).

Because consolidated cases are not merged, when a final judgment is entered ending all claims in one case, 28 U.S.C. § 1291, rather than Rule 54(b), provides the sole basis for an appeal in that case.

D. Litigants need a uniform rule that clearly identifies when appellate jurisdiction attaches. The final judgment rule provides the best rule: It is clear; it is consistent with Section 1291 and *Gelboim*; and it still allows the circuits the flexibility to manage their dockets to avoid piecemeal appeals.

The importance of a uniform rule for the application of the final judgment rule is well-established:

> [W]hat is of importance here is . . . preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule . . . .

Budinich, 486 U.S. at 202 (1988) (establishing uniform rule that a pending motion for an award of attorney's fees does not prevent a judgment on the merits from being final for purposes of Section 1291). Although the Court has recently clarified that the deadline for filing a notice of appeal is a mandatory claims processing rule rather than a jurisdictional limitation, *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658, 2017 WL 5160782 (Nov. 8, 2017), the need for a uniform rule is no less pressing. "If properly invoked, mandatory claims processing rules must be enforced, but they may be waived or forfeited." *Id.*, slip op. at 3. One who misses a mandatory claims processing deadline can suffer the same fate as one who misses a jurisdictional deadline and therefore the need for a uniform rule is equally important.

A litigant should be able to apply "a clear test" to determine how to perfect an appeal. *Heckler v. Edwards*, 465 U.S. 870, 877 (1984). There should be certainty about the event that triggers the 30-day period for taking an appeal.

1. The current approach taken by the majority of the circuits creates too much uncertainty as to when to appeal.

As detailed in the Petition for Writ of Certiorari at 8-9, the Third Circuit and six other circuits use a case-by-case approach to the appealability of a final decision in a consolidated case. The very nature of a case-by-case test for appealability defines the test as uncertain —a party will not know if the case is appealable until after the court of appeals rules. The Second Circuit's test, which ostensibly does not use a case-by-case approach but allows appeals in "highly unusual circumstances," *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988), likewise puts the litigant in the unacceptable position of not knowing whether it can appeal until the Second Circuit announces whether the highly unusual circumstances exist.

Under the tests followed in these eight circuits, a litigant must either be able to predict with 20-20 foresight whether the case is appealable; or, it must take the safe route and file a protective appeal as petitioner did in this case. In the Second Circuit, that foresight requires being able to ascertain whether the circuit believes "the district court clearly intended final judgment to be entered," *Kamerman v. Steinberg*, 891 F.2d 424, 429–30 (2d Cir.1989), or that the case is "a certain type of claim." *Kelly v. City of N.Y.*, 391 Fed.

App'x 69, 70 (2d Cir. 2010). But, the Second Circuit has yet to define which cases are of that "certain type."

If the litigant does not file a protective appeal, it can anticipate a jurisdictional challenge when it files its appeal after all consolidated cases are final. Sometimes, the appellant will get lucky and survive such a challenge. *See, e.g., Biocore, Inc. v. Khosrowshahi*, 80 Fed. App'x 619, 623-24 (10th Cir. 2003) (denying challenge to appellate jurisdiction where appellant did not appeal until all consolidated cases were final).

Because the stakes—the risk of having an appeal dismissed as untimely—are so high, a wise advocate will always file a protective appeal when a judgment is entered in a single case that is consolidated with other cases that remain pending. A party cannot afford to await resolution of all consolidated cases before appealing; because, the circuit might then declare, "Sorry, this was one of the cases that should have been filed when the final judgment was entered in the specific proceeding."[15] *See, e.g., Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 794 n.7 (3d Cir. 1992) (describing eleven appeals and cross-appeals arising from consolidated cases because the parties were

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[15] *Hamer*'s ruling—that the deadline for filing an appeal is a claims processing rule—will potentially allow courts to invoke equity to allow an untimely appeal in such circumstances. Nevertheless, the establishment of a bright line rule will still (1) eliminate the need for filing a protective appeal and (2) avoid the need to resort to equity when a party who waits to appeal until all of the consolidated cases are final is informed that its appeal is too late because it should have filed its appeal when its own case became final.

"uncertain whether certain of the district court's actions were then final under 28 U.S.C. § 1291").

2. The rule followed in the Ninth, Tenth and Federal circuits is inefficient and contrary to the express language of Section 1291.

The Ninth, Tenth and Federal Circuits will not entertain any appeal from any consolidated case until all cases in the consolidated proceeding are final. *See Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad. Corp.*, 827 F.2d at 675; *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1381 (Fed. Cir. 1996). As noted in *Bergman*, this rule is "unwise" because it will not allow an appeal from a final judgment in one case even if the case was consolidated with another only for limited discovery purposes. *Bergman*, 860 F.2d at 566. Moreover, the rule prohibiting an appeal until all cases are final is contrary to the plain language of Section 1291.

3. The court should adopt the same rule that it adopted in *Gelboim*.

In *Gelboim*, as in *Budinich*, this Court vindicated the importance of uniformity and bright line rules that give parties clear notice of the event that triggers the "appeal-clock." That clarity is likewise needed in the context of appeals involving Fed. R. Civ. P. 42. The Court should adopt the same rule that it adopted in *Gelboim*: Entry of final judgment in a case renders it appealable notwithstanding that the case is consolidated with another case that is not final. Such a rule is consistent with Section 1291. Yet, it does not deprive the courts of appeals of the ability to stay appeals

when the appellate court concludes that justice will be served by deferring the appeal until the rest of the consolidated proceeding is complete.

Importantly, this flexibility will allow a court of appeals to consider the impact of delay upon the appellant. The circumstances of petitioner's situation demonstrate the unfairness of the Third Circuit's rule. Petitioner is unable to close out her mother's estate until the litigation is concluded. The judgment was entered in early February 2015. By the time this case is before the Court for oral argument, the delay to petitioner's statutory right of appeal will approach three years. And, since the other case, 13-95, still awaits entry of judgment, briefing on post-judgment motions and then a ruling on those post-judgment motions, as long as this case is tethered to 13-95, there is no end in sight to the ongoing prejudice to petitioner.

CONCLUSION

For the foregoing reasons, this Court should hold that the Third Circuit had jurisdiction over petitioner's appeal and therefore reverse the decision of the Third Circuit. It should remand with instructions to the Third Circuit to reach the merits of petitioner's appeal.

Respectfully submitted,

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No. 16-1150

IN THE

Supreme Court of the United States

ELSA HALL,
As Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,
Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a party may appeal as of right from a judgment that resolves some but not all claims in a case consolidated for all purposes pursuant to Federal Rule of Civil Procedure 42(a).

RULE 29.6 DISCLOSURE STATEMENT

Hall & Griffith, P.C., has no parent corporation, and no publicly held company owns 10% or more of the company's stock.

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IN THE

Supreme Court of the United States

No. 16-1150

ELSA HALL,
As Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,
Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS

INTRODUCTION

The final judgment rule ordinarily restricts parties to a single appeal as of right at the conclusion of a case. For decades, the Court has held that this rule does not permit litigants to appeal a decision that resolves some but not all claims pending before the district court. Such a decision does not "end[] the litigation on the merits." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). And requiring appellate courts to review each claim piecemeal, rather than in a single combined appeal, would inevitably waste

judicial resources, deprive district courts of control over their dockets, and impose unnecessary costs on the litigants themselves.

These principles apply with equal force whether multiple claims are brought in a single action or, as here, in separate actions that are subsequently consolidated "for all purposes." In every pertinent respect, the two circumstances are identical: Claims are decided pursuant to joint proceedings, involve common issues of law or fact, and constitute a single "judicial unit." Treating a fully consolidated case differently than a multiple-claim action would generate perverse incentives, encouraging litigants to split their claims so as to secure a right of immediate appeal. And allowing immediate appeal from a judgment resolving some but not all claims in a fully consolidated case would undercut the policies the final judgment rule seeks to promote: efficiency for appellate courts, docket control for district courts, and fairness to litigants.

Accordingly, the courts of appeals are virtually unanimous in holding that parties may file an appeal as of right in a fully consolidated case only when the district court resolves all claims and "disassociates itself from [the] case." *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995). This rule does not preclude litigants from filing immediate appeals where appropriate. Rather, parties may invoke one of the safety valves Congress and this Court specifically designed to authorize discretionary appeals where efficiency and equity so warrant, including certification pursuant to Federal Rule of Civil Proce-

dure 54(b), interlocutory appeal under 28 U.S.C. § 1292, or the writ of mandamus.

Petitioner, however, did not invoke any of these established routes to review. After the District Court entered judgment on some, but not all, of several closely related claims in a case consolidated for all purposes, petitioner immediately sought an appeal as of right from the partial judgment. The Third Circuit dismissed that appeal for lack of jurisdiction, instructing petitioner that the proper course was to seek a discretionary appeal under Rule 54(b). That judgment properly prevented petitioner and other similarly situated litigants from short-circuiting the appeals process and upsetting the balance struck by the final judgment rule. The judgment should be affirmed.

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

Pertinent statutory provisions and Federal Rules of Civil Procedure are reproduced in an addendum to this brief. Add. 1a-6a.

STATEMENT

A. Legal Background

1. The Federal Rules reflect a "liberalization" of joinder practice designed "to allow more issues and parties to be joined in one action." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Numerous provisions of the Federal Rules accordingly permit parties and courts to present and resolve related claims in a single case. They permit a plaintiff to file "as many claims as it has against an opposing party," Fed. R. Civ. P. 18(a); permit (and

sometimes require) defendants to file counterclaims, crossclaims, and third-party claims, Fed. R. Civ. P. 13, 14, 18; and allow interested third parties to join a suit and press potentially relevant claims of their own, Fed. R. Civ. P. 19, 20, 22.

Rule 42(a) offers one means by which courts can decide related claims together. It provides that "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a).

Rule 42(a) has long been understood to permit two forms of consolidation. *See Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897, 904-905 n.4 (2015). First, courts may "partially consolidate" related claims by holding joint proceedings for some but not all matters at issue. *E.g.*, *Am. Nat'l Bank & Tr. Co. of Chicago* v. *Equitable Life Assurance Soc'y of U.S.*, 406 F.3d 867, 876 (7th Cir. 2005). In these circumstances, each case retains a separate docket. The consolidation may extend only to certain proceedings—say, discovery but not trial. *See id.* And the cases may become decoupled and once again continue on wholly separate tracks once the consolidated proceedings conclude. *See, e.g.*, *Burton* v. *Am. Cyanamid*, Nos. 07-cv-0303 et al., 2016 WL 3661331, at *1 (E.D. Wis. July 5, 2016); *Anticancer, Inc.* v. *Cambridge Research & Instrumentation, Inc.*, Nos. 07CV97 JLS (RBB) & 07CV1004 JLS (AJB), 2007 WL 9627562, at *2 (S.D. Cal. Nov. 2, 2007).

Second, courts may consolidate claims "for all purposes." *Gelboim*, 135 S. Ct. at 904 n.4. All-purpose consolidation works to unify cases in almost every respect. *See, e.g.*, *Ringwald* v. *Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Florida Wildlife Fed'n, Inc.* v. *Adm'r, U.S. E.P.A.*, 737 F.3d 689, 693 (11th Cir. 2013) (per curiam). The actions are typically placed on a single docket.[1] They undergo every stage of the proceedings together, from discovery through jury selection, trial, and verdict. *See, e.g.*, 15B Charles Alan Wright et al., Federal Practice & Procedure § 3914.20 (2d ed. 2017 update). And they continue to travel together until the district court resolves every claim at issue. *Id.* Because all-purpose consolidation is so comprehensive, courts typically order it only where the actions present common issues of law or fact that are "central to the resolution of the cases." *E.g.*, *Johnson* v. *Doyle*, No. 4:07CV1843 AGF, 2010 WL 1692212, at *1 (E.D. Mo. Apr. 27, 2010); *CSX Transp., Inc.* v. *Alban Waste, LLC*, Nos. JKB-13-1770 & JKB-14-137, 2014 WL 1340041 (D. Md. Apr. 2, 2014).

2. Federal law contains a carefully designed set of rules governing the time at which a party may appeal judgment in cases involving multiple claims. Section 1291 supplies the default rule. It provides,

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[1] *See, e.g.*, *Crest Audio, Inc.* v. *QSC Audio Prods., Inc.*, Nos. 3:12-cv-755-CWR-FKB & 3:13-cv-610-CWR-FKB, 2016 WL 3249217, at *3 (S.D. Miss. Mar. 4, 2016); *Reckitt Benckiser LLC* v. *Amneal Pharm. LLC*, Nos. 15-2155(RMB/JS) & 15-4524(RMB/JS), 2016 WL 208295, at *2 (D.N.J. Jan. 15, 2016); Pet. App A-15.

as relevant, that parties may appeal "*final* decisions of the district courts of the United States * * * and the District Court of the Virgin Islands." 28 U.S.C. § 1291 (emphasis added). A decision is "final" for purposes of this provision only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Riley* v. *Kennedy*, 553 U.S. 406, 419 (2008) (quoting *Catlin*, 324 U.S. at 233). Accordingly, a litigant cannot appeal until the "district court disassociates itself from [the] case" as a whole, even if judgment has been rendered on some of the claims at issue. *Swint*, 514 U.S. at 42.

Rule 54(b), however, offers a discretionary means of obtaining immediate review of a decision resolving some but not all claims in a case. The Rule reiterates that parties may obtain an appeal *as of right* only when a court enters "judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). But it provides that "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." *Id.* In this way, the Rule makes the district court a "dispatcher" in multiple-claims cases, giving it discretion to decide whether to permit an earlier appeal than the final judgment rule normally allows. *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956).

Federal law also provides two other avenues for parties to obtain immediate appeal of adverse judgments in a multiple-claim action. Section 1292(b) authorizes an interlocutory appeal where a non-final order "involves a controlling question of law as to

which there is substantial ground for difference of opinion" and from which "an immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). And the writ of mandamus enables a party to petition a court of appeals to promptly reverse "a judicial usurpation of power or a clear abuse of discretion." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009) (quoting *Cheney* v. *U.S. Dist. Court for D.C.*, 542 U.S. 367, 390 (2004)).

B. Factual And Procedural Background

1. Samuel Hall and Elsa Hall are siblings. For many years, Samuel served as caretaker to Ethlyn Hall, the siblings' mother, at her home in the Virgin Islands. J.A. 110 ¶ 15. During that time, Samuel provided free legal assistance to Ethlyn, managed Ethlyn's property, and performed grocery shopping and other chores on her behalf. Pet. App. A-3; J.A. 120-121 ¶ 79. As Ethlyn began to exhibit signs of diminished mental capacity, Samuel took an increasingly active role in Ethlyn's care. J.A. 128 ¶ 120.

In 2010, Elsa—who up to that point played a minimal role in caring for her mother—visited Ethlyn in the Virgin Islands and, without informing Samuel, relocated her to Miami, Florida. J.A. 109 ¶ 6; J.A. 121-122 ¶¶ 80, 84-85, 87. The following year, a complaint was filed purportedly on Ethlyn's behalf against Samuel and his law firm, Hall & Griffith, P.C. J.A. 1-2. This lawsuit, docketed as civil action number 11-54, alleged that Samuel had breached his fiduciary duty to Ethlyn and committed conversion, malpractice, and fraud. J.A. 27-42. The complaint's central allegation was that Samuel and his law firm

had managed one of Ethlyn's Virgin Islands properties for Samuel's own benefit, rather than in the interests of Ethlyn. *Id.*

While this lawsuit was still in its preliminary stages, Ethlyn died, and Elsa became trustee of Ethlyn's estate. J.A. 18. Elsa amended the complaint and continued pressing the suit in a representative capacity. J.A. 2, 18-19.

In their answer to Elsa's complaint, Samuel and his law firm denied Elsa's allegations and filed a counterclaim against Elsa in both her individual and representative capacities. J.A. 61-107; *see* Pet. App. A-4 to A-5 n.4. Samuel alleged that it was Elsa who had breached her fiduciary duty to Ethlyn, by taking advantage of Ethlyn's diminished mental capacity to persuade Ethlyn to appoint Elsa as trustee. J.A. 94-96. Furthermore, Samuel alleged that Elsa had committed intentional infliction of emotional distress, conversion, fraud, and other intentional torts by alienating Ethlyn from Samuel and misappropriating Ethlyn's property for Elsa's own benefit. J.A. 96-102. Samuel's claims, like Elsa's, revolved in part around Ethlyn's intentions regarding her property in the Virgin Islands; among other things, Samuel alleged that Elsa had misappropriated funds that Ethlyn had allocated for construction of the property. J.A. 93, 102.

Because Elsa was a plaintiff solely in her representative capacity, Samuel subsequently determined that his counterclaims were more appropriately brought in a separate complaint. Samuel therefore filed a new complaint, in a case docketed as civil action number 13-95, re-raising his claims against

Elsa in her individual capacity. J.A. 108. The substance of this complaint was materially identical to the counterclaim; it alleged the same intentional torts and turned on substantially the same allegations. J.A. 142-151. Accordingly, Samuel moved to consolidate the claims with the 11-54 action. J.A. 3. The District Court granted the motion, consolidating the cases for all purposes and directing that "[a]ll submissions in the consolidated case" be docketed in the 11-54 action. Pet. App. A-15. All subsequent proceedings were thus held jointly: The court resolved motions on a single docket, issued a joint trial management order, and held a single jury trial on all claims. J.A. 4; Pet. App. A-4, A-8.

2. The jury returned a single verdict finding for Samuel on all counts. J.A. 163-172. It rejected Elsa's claims that Samuel had committed breach of fiduciary duty, conversion, and fraud. J.A. 163-167. And it found that Elsa had intentionally inflicted emotional distress on Samuel, awarding him substantial compensatory and punitive damages as a result. J.A. 168, 172.

Elsa moved for a new trial as to Samuel's claims against her. J.A. 7. While that motion was pending, Elsa filed a notice of appeal as to the judgment rejecting her claims against Samuel. J.A. 7-8. Before the Court of Appeals had considered that appeal, the District Court granted the motion for a new trial. J.A. 10, 13; Pet. App. A-5 to A-6. Samuel's claims "remain outstanding" in the District Court, and the District Court has not yet issued final judgment on them. Pet. App. A-7; Cert. Reply 1.

3. The Third Circuit dismissed Elsa's appeal for lack of jurisdiction in a unanimous, non-precedential opinion. Pet. App. A-3. The court explained that "[w]hen two cases have been consolidated for all purposes, a final decision on one set of claims is generally not appealable while the second set remains pending." Pet. App. A-7. Here, "Samuel's claims against Elsa were consolidated for all purposes with the Estate's claims against him," and "were in fact scheduled together and tried before a single jury." Pet. App. A-4, A-8. Furthermore, "the trial record illustrate[d] some overlap of evidence among the claims": For instance, "[w]itnesses such as Samuel and Elsa would inevitably testify in a suit involving either set of claims, and both sets of claims may turn on" Ethlyn's state of mind, including "how [she] reacted to learning about" Samuel's management of her property and "who or what was influencing her thinking at the time." Pet. App. A-8. Because of these significant commonalities, "[t]here are also likely [to] be overlapping issues on appeal once Samuel's claims become appealable." Pet. App. A-9. Recognizing that "the District Court decided that justice and judicial economy were best served by consolidation in the first place," the Third Circuit concluded that it would "not second guess that judgment * * * by allowing piecemeal appeals." *Id.*

The Court of Appeals noted, however, that its holding did not preclude Elsa from seeking immediate appeal. Elsa "could have sought Rule 54(b) certification"; indeed, her counsel "conceded that nothing prevented him from seeking a Rule 54(b) motion even as the appeal was pending before" the Third Circuit. Pet. App. A-9 n.11. Yet Elsa's counsel

"chose not to do so." *Id.* Because Elsa had not availed herself of "that mechanism to certify appeals when finality is either lacking or in doubt," the court lacked jurisdiction to consider her appeal. *Id.*

SUMMARY OF ARGUMENT

In a case consolidated for all purposes pursuant to Rule 42(a), a party may not file an appeal as of right from a judgment that resolves some but not all pending claims. Petitioner's appeal was accordingly premature, and the Third Circuit correctly concluded that it lacked jurisdiction.

I. A. Under 28 U.S.C. § 1291, litigants may file an appeal as of right only when a district court issues a "final decision" in a case. It is well-established that, in a multiple-claim action, an order resolving some but not all claims is not a "final decision" subject to immediate appeal. Rather, an appeal as of right is permitted only when a court disposes of all claims in the "judicial unit" as a whole. *Mackey*, 351 U.S. at 432. This Court has held that this rule applies even when the various claims were initially filed as part of different actions and later joined together. *See Cold Metal Process Co.* v. *United Eng'g & Foundry Co.*, 351 U.S. 445, 451 (1956).

B. That principle resolves this case. A case consolidated for all purposes is in every pertinent respect identical to a case involving multiple claims: In each circumstance, the claims are adjudicated together from start to finish, revolve around the same "common questions of law or fact," and "meld" into a "single unit." *Gelboim*, 135 S. Ct. at 905. If claims filed by different parties under different dockets constitute a "single judicial unit" for purposes of the

final judgment rule, as this Court has held, then there is no reason a different result should obtain for cases consolidated for all purposes. That conclusion accords with this Court's decision in *Gelboim*, which recognized the difference between consolidation solely for pre-trial purposes and consolidation for all purposes. And it prevents litigants from evading the longstanding limits on appeals as of right simply by splitting their claims across multiple lawsuits.

C. This conclusion is reinforced by the fact that a judgment resolving only some claims in a fully consolidated case lacks the hallmarks of a final judgment. Such a decision does not end the litigation on the merits. Nor does it furnish the party's last opportunity for an appeal, given that the court still must issue an order resolving the remaining claims. And such a judgment is likely to be closely intertwined with the merits of the claims that remain to be decided. This Court has never deemed a judgment final that is so patently inconclusive.

D. Furthermore, allowing an appeal as of right each time a court issues partial judgment in a fully consolidated case would contravene the purposes of the final judgment rule. It would encourage piecemeal appeals and sap appellate resources; deprive district courts of control over their dockets; and subject parties to the cost and harassment of a succession of separate appeals.

II. Although litigants lack an appeal as of right from partial judgment in a fully consolidated case, federal law provides three "safety valve[s]" that enable discretionary appeals where appropriate. *Mohawk*, 558 U.S. at 111. Rule 54(b) permits district

courts to authorize immediate appeal from a partial judgment that is *independent* of the merits of the claims that remain. Fed. R. Civ. P. 54(b). Section 1292(b) authorizes interlocutory appeal from a judgment that is *important* to resolution of the case as a whole. And the writ of mandamus enables review of clear and manifest *errors*. These discretionary avenues of review enable immediate appeal where efficiency and fairness warrant it. And they place control over the timing of appeals in the hands of the tribunal most familiar with the case: the district court.

Petitioner, by contrast, is unable to identify any workable system for mitigating the harms imposed by her proposed rule, which would require an appeal from *every* partial judgment in a case consolidated for all purposes. Petitioner suggests that the courts of appeals should enter a stay whenever the claim being appealed is sufficiently related to the issues that remain unresolved in the district court. But that system would put control over the timing of appeal in the hands of the tribunal *least* familiar with the case, and would not be governed by any discernible legal standards. The fact that the law provides no workable system for excepting claims from petitioner's rule is a telling indication that that rule lacks a valid legal basis.

III. Petitioner's appeal is therefore premature. The district court consolidated Samuel's claims and Elsa's claims for all purposes. But petitioner appealed before the district court had entered final judgment on Samuel's claims, and petitioner never sought certification under Rule 54(b). The Third

Circuit correctly concluded that it lacked jurisdiction over petitioner's appeal. This Court should affirm.

ARGUMENT

I. LITIGANTS MAY NOT APPEAL AS OF RIGHT FROM A JUDGMENT THAT RESOLVES SOME BUT NOT ALL CLAIMS IN A CASE CONSOLIDATED FOR ALL PURPOSES.

Virtually every court of appeals bars litigants from filing an appeal as of right in a fully consolidated case until the district court has resolved each of the claims before it.[2] This consensus flows directly from

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[2] *See Glob. NAPs, Inc.* v. *Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005); *Houbigant, Inc.* v. *IMG Fragrance Brands, LLC*, 627 F.3d 497, 498-499 (2d Cir. 2010) (per curiam); *Bergman* v. *City of Atl. City*, 860 F.2d 560, 566-567 (3d Cir. 1988); *Watson* v. *Adams*, 642 F. App'x 240, 241 (4th Cir. 2016) (per curiam); *Ringwald*, 675 F.2d at 771; *Alinsky* v. *United States*, 415 F.3d 639, 642 (7th Cir. 2005); *Tri-State Hotels, Inc.* v. *FDIC*, 79 F.3d 707, 711 (8th Cir. 1996); *Huene* v. *United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad. Corp.* v. *Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam); *Schippers* v. *United States*, 715 F.3d 879, 884 (11th Cir. 2013); *U.S. ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003); *Spraytex, Inc.* v. *DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996). The only arguable exception to this consensus is the Sixth Circuit, and it has issued inconsistent rulings on the question. *Compare Advey* v. *Celotex Corp.*, 962 F.2d 1177, 1181 (6th Cir. 1992), *with Beil* v. *Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). Contrary to petitioner's characterization, *see* Br. 15, the First Circuit has held that the "disposition of one case in a consolidated action is a final and appealable judgment *unless the cases were consolidated for all purposes.*" *Glob. NAPs*, 396

the decades-old principle that litigants lack an appeal as of right until a district court has resolved each claim in a suit; in every pertinent respect, a fully consolidated case is indistinguishable from any other suit in which multiple claims are joined for adjudication. Moreover, a partial judgment in a fully consolidated case lacks the fundamental hallmarks of finality. And entitling parties to immediately appeal such judgments would subvert the aims of the final judgment rule and generate substantial inefficiencies and inequities that that rule is designed to prevent. There is no basis for upsetting the established practice of the judicial system in favor of petitioner's proposed regime of mandatory piecemeal appeals—one that no circuit employs, that no precedent supports, and that would predictably upset the operation of innumerable appeals filed in the federal courts day in and day out.[3]

A. Litigants Are Generally Entitled To A Single Appeal From Final Judgment In Cases Involving Multiple Claims.

1. " 'From the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.' " *Microsoft Corp.* v. *Baker*,

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F.3d at 22 (emphasis added) (internal quotation marks omitted).

[3] This case does not concern the timing of appeal in a *partially* consolidated case. *See supra* pp. 4-5 (distinguishing partial consolidation and consolidation for all purposes). As this Court recognized in *Gelboim*, that question may present substantially different issues. *See Gelboim*, 135 S. Ct. at 904-905 n.4.

137 S. Ct. 1702, 1712 (2017) (quoting *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891)) (brackets in original). This venerable principle is embodied in 28 U.S.C. § 1291, which provides as relevant that "[t]he courts of appeals *** shall have jurisdiction of appeals from all final decisions of the district courts of the United States *** and the District Court of the Virgin Islands."

The final judgment rule "promotes the efficient administration of justice." *Microsoft*, 137 S. Ct. at 1712; *see also Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). By restricting parties to a single appeal as of right, it "prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of *** a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). It preserves "the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)). And it protects parties from "the harassment and cost" that would inevitably arise if unsuccessful litigants could subject their opponents to "a succession of separate appeals." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

In light of these important objectives, the Court "'has long given' § 1291 a 'practical rather than a technical construction.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). As a general matter, a decision is "final" within the meaning of section 1291 only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judg-

ment." *Riley*, 553 U.S. at 419 (quoting *Catlin*, 324 U.S. at 233). The Court has explained that such a decision bears several important hallmarks of finality: It is a decision "by which a district court disassociates itself from a case," *Swint*, 514 U.S. at 42; it furnishes a party's last effective opportunity for appeal, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); and it leaves undecided only those ancillary questions—regarding attorney's fees and other similar matters—whose resolution would not assist appellate review of the merits, *Ray Haluch Gravel Co.* v. *Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 134 S. Ct. 773, 779-780 (2014).

The Court has also recognized "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at 545-546). These decisions exhibit the same essential characteristics of finality as judgments ending the litigation on the merits: They too are "conclusive," "effectively unreviewable on [subsequent] appeal," and "separate from the merits" of the issues that remain. *Id.* (quoting *Swint*, 514 U.S. at 42). There is only a "modest" set of decisions, however, that satisfy these demanding criteria, *Will* v. *Hallock*, 546 U.S. 345, 350 (2006), and are so important as to "overcome the usual benefits of deferring appeal until litigation concludes," *Mohawk*, 558 U.S. at 107.

Apart from these collateral orders, section 1291 does not permit appeal from decisions—"even from fully consummated decisions"—that do not conclude the litigation on the merits. *Cohen*, 337 U.S. at 546.

Such decisions may be of great importance to the parties; they may deny claims, reject defenses, dismiss parties from the suit, and more. But they are "but steps towards final judgment in which they will merge." *Id.* Delaying appeal of such orders does not cause any party to irrevocably "los[e]" her rights. *Id.* Moreover, those decisions may yet "affect, or * * * be affected by, decision of the merits of th[e] case." *Id.* Congress struck the balance in section 1291 that decisions of this nature can "be reviewed and corrected" only "if and when final judgment results." *Id.*

2. It is well-settled that orders resolving some but not all claims in a case are not final judgments appealable as of right under section 1291. As the Court explained in *Mackey*, section 1291 provides "no authority for treating anything less than the whole case as a judicial unit for purposes of appeal." 351 U.S. at 432. And a decision as to only some claims "obviously [i]s not a final decision of the whole case." *Id.* at 431-432. Numerous cases have reaffirmed this basic principle. *See, e.g.*, *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 276 n.7 (1988) ("separate reviews of the component elements in a unified cause" are not permitted); *Coopers & Lybrand*, 437 U.S. at 467 n.8 (same); *Firestone*, 449 U.S. at 374 (explaining that the "rule" is that "a party must ordinarily raise all claims of error in a single appeal"); *see also* 15A Charles Alan Wright et al., Federal Practice & Procedure § 3914.7 (2d ed. 2017 update).

Rule 54(b) reflects this settled understanding. It states that "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim,

crossclaim, or third-party claim—or when multiple parties are involved," an order that "adjudicates fewer than all the claims * * * *does not* end the action as to any of the claims." Fed. R. Civ. P. 54(b) (emphasis added). Rather, such an order "may be revised at any time before the entry of a judgment adjudicating *all* the claims and *all* the parties' rights and liabilities." *Id.* (emphases added).

Rule 54(b) also establishes a discretionary exception to this rule. It states that if a district court "determines that there is no just reason for delay," it may "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." *Id.* This language gives the district court *discretion* to certify an appeal as to some claims in a multiple-claim case. *Mackey*, 351 U.S. at 435. But it does not afford litigants an appeal *as of right* prior to entry of final judgment on all claims. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 691 (2010) (Ginsburg, J., dissenting) (identifying this language as an "exception[] to the 'final-decision' rule").

Accordingly, this Court has long recognized that parties may appeal a judgment that resolves some but not all claims in a case only if they obtain certification under Rule 54(b). In *Mackey*, for instance, the Court held that a plaintiff needed to obtain Rule 54(b) certification to appeal a judgment "striking out Counts I and II" of her complaint "without disturbing Counts III and IV." 351 U.S. at 430, 438. For "good reason," the Court explained, "[t]he timing of such a release is * * * vested by the rule primarily in the discretion of the District Court as the one most likely

to be familiar with the case and with any justifiable reasons for delay." *Id.* at 437.

In *Cold Metal Process Co.*—a companion case decided the same day as *Mackey*—the Court held that this same rule applied where multiple claims were filed as different actions and later joined together. In that case, the defendant had filed a "counterclaim * * * long after the principal proceeding [had] begun," as part of "another action" with "a separate case number." 351 U.S. at 446, 448-449. But the Court nonetheless found that the claims needed to be appealed together: Both were "within the jurisdiction of the District Court" as part of a single broad proceeding, and so together they constituted a "single judicial unit" for purposes of appeal. *Id.* at 449, 451. Absent Rule 54(b) certification, the court of appeals "would have been without jurisdiction until [the] counterclaim also had been decided by the District Court." *Id.* at 451.

3. Three Terms ago, in *Gelboim*, the Court clarified that the final judgment rule does not bar appeal as of right from a judgment dismissing some but not all claims in an action consolidated solely "for pretrial proceedings in multidistrict litigation" (MDL). 135 S. Ct. at 901. This limited consolidation, the Court concluded, did not render the claim a single "judicial unit" for purposes of appeal. *Id.* at 905.

The Court pointed to several features of an MDL that support this conclusion. The Court explained that the MDL statute expressly refers to the claims as separate "actions," not as a single case. *Id.* at 904. Furthermore, actions joined in an MDL are only temporarily part of the same consolidated proceeding,

and will ultimately be "remanded to the[ir] originating district[s]" for decision on the merits; they accordingly cannot be said to "meld *** into a single unit." *Id.* at 905. And, critically, a transferee court is not required to render *any* judgment at the conclusion of the MDL proceeding, making it impossible to identify any single "final decision" from which a litigant may appeal. *Id.* at 905.

The Court repeatedly emphasized, however, that its conclusion does not mean that claims consolidated for *all purposes* are separately appealable as of right. It explicitly stated that it "express[ed] no opinion on whether an order deciding one of multiple cases combined in an *all-purpose* consolidation qualifies under § 1291 as a final decision appealable as of right"—and indeed quoted the Seventh Circuit's holding that such cases "become a single judicial unit" once consolidated. *Id.* at 904 n.4 (emphasis added) (quoting *Brown* v. *United States*, 976 F.2d 1104, 1107 (7th Cir. 1992)). Moreover, the Court stated that it "need not decide whether or how Rule 54(b) applies to cases consolidated for all purposes involving closely related issues," which, it noted, often "could have been brought under the umbrella of one complaint." *Id.* at 906 n.7.

B. A Case Consolidated For All Purposes Should Be Treated No Differently Than Other Cases Involving Multiple Claims.

A case consolidated for all purposes is indistinguishable from any other case involving multiple claims for relief: It involves a single set of procedures, implicates a "common question of law or fact," and comprises a single judicial unit. This Court has

repeatedly held that actions involving multiple claims—even where filed as part of different actions and by different parties—are appealable only upon final judgment. There is no basis for treating fully consolidated cases any differently, particularly as doing so would allow easy evasion of the limits on appeals as of right in multiple-claim actions.

1. In every way, cases consolidated for all purposes are "meld[ed] * * * into a single unit" that is indistinguishable from any other case involving multiple claims for relief. *Gelboim*, 135 S. Ct. at 905.

First, fully consolidated actions are *procedurally* unitary. They are placed on a single docket. They are subject to a single set of proceedings, from discovery to jury selection to trial. And they remain together until their conclusion, and are never decoupled or "remanded to the[ir] originating" courts. *Id.*; *see supra* p. 5.

Second, fully consolidated actions are *substantively* a single unit. To order any form of consolidation, a court must find that the various claims present "a common question of law or fact." Fed. R. Civ. P. 42(a). And to order all-purpose consolidation, courts typically require that the common issue be "central to the resolution of the cases." *Johnson*, 2010 WL 1692212, at *1 (internal quotation marks omitted); *see supra* p. 5. These standards closely resemble the criteria provided by other Rules for joining related claims in a single case. *See, e.g.*, Fed. R. Civ. P. 13, 19, 23. Indeed, a core function of consolidation is to permit courts to combine actions that "*could* have been brought under the umbrella of one" case, whether as multiple counts of a single complaint, or

as counterclaims, crossclaims, or third-party claims. *Gelboim*, 135 S. Ct. at 906 n.7 (emphasis added). The commonality between claims consolidated for all purposes will thus be no less than—and often substantially greater than—claims filed as part of the same case pursuant to the Rules' "liberal joinder" provisions. *Mackey*, 351 U.S. at 432.

Third, the text of Rule 42(a) indicates that fully consolidated actions *formally* become a single case. Rule 42(a) provides that where two actions raise "a common question of law or fact," courts may "consolidate the actions." Fed. R. Civ. P. 42(a)(2). At the time of the Rule's enactment, as now, the term "consolidate" meant to "unite into one system or whole." American Heritage Dictionary of the English Language (5th ed. rev. 2017); *see* Oxford English Dictionary (2d ed. 1989) (similar); Black's Law Dictionary (10th ed. 2014) ("[t]o combine or unify * * * into one mass or body" or, in civil procedure specifically, "[t]o combine, through court order, two or more actions involving the same parties or issues into a single action"). The plain meaning of the phrase "consolidate the actions" is thus to "unite" two or more actions into "one * * * whole"—that is, to join them into a single case.

This reading is supported by context. Rule 42(a)(1) grants courts authority to "join for hearing or trial any *or all* matters at issue in the actions." Fed. R. Civ. P. 42(a)(1) (emphasis added). If all-purpose "consolidation" pursuant to Rule 42(a)(2) merely entailed joining multiple actions for procedural purposes, it would be wholly duplicative of Rule 42(a)(1). Rule 42(a)(2) therefore must permit courts

to do something more: not just to hold joint hearings or trial, but to "consolidate" the actions *themselves* into a single unit. What is more, other provisions of federal law—including the MDL provision at issue in *Gelboim*—authorize courts to hold "consolidated * * * *proceedings*" in multiple cases. 28 U.S.C. § 1407(a) (emphasis added); *see also id.* § 1332(d)(11)(B)(ii)(IV); 15 U.S.C. § 1195(b); *cf.* Fed. R. Civ. P. 65(a)(2). Had the drafters wished to permit courts simply to unite the "proceedings" in a case, they would presumably have used similar language in Rule 42(a)(2), rather than authorizing courts to unite the "actions" themselves.

Accordingly, it is difficult to conceive of any meaningful respect—procedural, substantive, or formal—in which a case consolidated for all purposes differs from a case in which the relevant claims were filed together or joined pursuant to one of the Rules' "liberal joinder" provisions. *Mackey*, 351 U.S. at 432. Particularly given this Court's repeated admonition that the final judgment rule must be given "a practical rather than a technical construction," *Mohawk*, 558 U.S. at 106 (internal quotation marks omitted), the functional as well as formal identity between fully consolidated cases and multiple-claim actions dictates that they both should be treated the same way: as a single "judicial unit" appealable only when all claims are decided. *Mackey*, 351 U.S. at 432.

2. This Court's precedents strongly reinforce this conclusion. In *Cold Metal Process Co.*, the Court addressed a case that was substantially similar to a consolidated case: It involved a claim and a counterclaim that had been filed as separate "action[s]," by

different parties, fifteen years apart. 351 U.S. at 446-449. Each action bore "a separate case number" and sought different relief. *Id.* at 446, 449. Nonetheless, because the actions were "within the jurisdiction of" the same court, and the second action was deemed "ancillary" to the original proceeding, the Court held that they constituted a "single judicial unit" that could be appealed only pursuant to a Rule 54(b) certification. *Id.* at 449, 451-453. The Court emphasized, moreover, that this conclusion would hold "even if the counterclaim did not arise out of the same transaction and occurrence as [the principal] claim." *Id.* at 451.

A case consolidated for all purposes pursuant to Rule 42(a) is at least as unitary as the actions at issue in *Cold Metal Process Co.* Unlike in *Cold Metal Process Co.*, fully consolidated actions are typically placed on a single docket and treated as one for all purposes. Moreover, they *must* involve "common question[s] of law or fact." Fed. R. Civ. P. 42(a). If the loose consolidation at issue in *Cold Metal Process Co.* was a single "judicial unit," then *a fortiori* an all-purpose consolidation under Rule 42(a) must be, too.

Gelboim also supports this conclusion. Every characteristic that the Court found indicative of the claims' separateness in *Gelboim* is absent in the case of all-purpose consolidation. Unlike the MDL statute, Rule 42(a) does not refer to fully consolidated claims as separate "actions" subject to "consolidated * * * proceedings," *Gelboim*, 135 S. Ct. at 904-905, but instead authorizes the actions *themselves* to be "consolidate[d]." Fed. R. Civ. P. 42(a)(2). A court at no point "remand[s]" the components of a consolidat-

ed case to a separate court, but rather adjudicates them together until their completion. *Gelboim*, 135 S. Ct. at 905. And a consolidated proceeding, unlike an MDL, must end with a clear judgment resolving all remaining claims, thereby furnishing parties a clear opportunity for appeal. *Id.* at 906.

Petitioner claims (at 18) that *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479 (1933), undermines this conclusion. It does not. *Johnson* merely held, several years before the Federal Rules' enactment, that where a district court consolidated two cases at the end of litigation solely for purposes of entering a joint order in both actions, the two cases did not merge into a "single cause" for purposes of issue preclusion. *See id.* at 494, 496-497. That holding is irrelevant three times over. It concerned a partially consolidated case, not a case consolidated for all purposes. It held only that the claims did not become a "single cause" for purposes of preclusion, not that they did not become a "single judicial unit" for purposes of the final judgment rule—a wholly unrelated question. *Id.* at 496-497. And the Court was construing a different statute, one from which the drafters of Rule 42 deliberately departed: Unlike the predecessor statute it replaced, Rule 42 differentiates between the authority to grant partial consolidations and the authority to grant consolidations for all purposes. *Compare* 28 U.S.C. § 734 (1934), *with* Fed. R. Civ. P. 42(a)(1)-(2); *see* Fed. R. Civ. P. 42 advisory committee's note to 1937 adoption (explaining that Rule

42(a) was "based upon" 28 U.S.C. § 734, "but in so far as the statute differs from this rule, it is modified").[4]

3. It is particularly important to treat fully consolidated cases as a single judicial unit for purposes of appeal because a contrary rule would enable parties to evade the careful system the Federal Rules impose for determining the timing of appeal in multiple-claim cases.

As noted above, Rule 54(b) sets out a specific procedure that parties must follow to obtain immediate appeal in a case "present[ing] more than one claim for relief." Fed. R. Civ. P. 54(b). It states that a party ordinarily may not appeal a "decision * * * that adjudicates fewer than all the claims" in a given case. *Id.* Final judgment is entered only when the court "adjudicat[es] all the claims and all the parties' rights and liabilities." *Id.* But the Rule provides a safety valve: If the district court wishes to authorize an earlier appeal, it "may direct entry of a final judgment as to one or more, but fewer than all,

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[4] The other three cases on which petitioner relies (at 18) are even less relevant. All three were decided before Rule 42 went into effect. Furthermore, in *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926), the Court authorized an appeal because the particular decision at issue satisfied the collateral order doctrine, not because of any rule generally applicable to consolidated cases. *Id.* at 413-414. In *Mutual Life Insurance Co. of New York* v. *Hillmon*, 145 U.S. 285 (1892), the Court considered a limited-purpose consolidation "for trial," not an all-purpose consolidation. *Id.* at 286. And *Withenbury* v. *United States*, 72 U.S. 819 (1866), was an admiralty case governed by an entirely different body of procedural law from ordinary civil actions. *See id.* at 820-821 (relying on a rule applicable to "a prize cause").

claims or parties only if the court expressly determines that there is no just reason for delay." *Id.*

The drafters designed this rule to vest the district court—rather than the litigants—with discretion to decide when immediate appeal is appropriate in multiple-claim cases. The drafters recognized that, in light of the "wide scope" of cases under the Federal Rules, parties might face "possible injustice" if required "to await adjudication of the entire case" before appealing "a distinctly separate claim." Fed. R. Civ. P. 54(b) advisory committee's note to 1946 amendment. But they also wished to "preserve[] the historic federal policy against piecemeal appeals." *Mackey*, 351 U.S. at 438. Accordingly, they chose to make the district court "a 'dispatcher,'" permitting it—as the tribunal "most likely to be familiar with the case and with any justifiable reasons for delay"—to determine "the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Id.* at 435, 437.

Permitting litigants to immediately appeal a partial judgment in cases consolidated for all purposes would enable them to circumvent this system with ease. Rather than filing their separate claims, counterclaims, and crossclaims as part of a single combined action, litigants could simply file each claim in a separate suit. By doing so, they could obtain an immediate appeal as to every dismissed claim, without first needing to ask the district court to grant a Rule 54(b) certification. And district courts would be powerless to prevent this evasion, because even all-purpose consolidation would not be

sufficient to unite the claims into a single judicial unit.

That concern is more than hypothetical. As petitioner attests (at 15), litigants typically dislike waiting until entry of final judgment to appeal adverse decisions. And parties often seek to split claims in order to obtain tactical litigation advantages. Indeed, even unsophisticated litigants sometimes file a bevy of claims separately and then seek to appeal them one-by-one. *See, e.g.*, *Ivanov-McPhee* v. *Wash. Nat'l Ins. Co.*, 719 F.2d 927, 927 (7th Cir. 1983) (consolidation of ten separate lawsuits by *pro se* plaintiff alleging employment discrimination); *Evans* v. *Groom*, No. 7:17-CV-4-BO, 2017 WL 2779645, at *2 (E.D.N.C. June 26, 2017) (consolidating two separate actions "aris[ing] out of the precise same event or series of events"). Nor would joinder rules and claim-splitting doctrines be sufficient to prohibit these pleading maneuvers: The Federal Rules require joinder only for a handful of mandatory counterclaims and crossclaims, *see* Fed. R. Civ. P. 13, and prohibitions on claim-splitting are restricted to claims that would be subject to issue preclusion if brought separately, *see* 18 Charles Alan Wright et al., Federal Practice & Procedure § 4406 (3d ed. 2017 update).

Last Term, in *Microsoft Corp.* v. *Baker*, the Court construed section 1291 to foreclose a similar means of "subvert[ing] the balanced solution" the Federal Rules established for appealing a particular class of orders. 137 S. Ct. at 1707. In that instance, the rule at issue was Rule 23(f), which gives courts of appeals "discretion" to grant "'permissive interlocutory

appeal' from adverse class-certification orders." *Id.* at 1709. A putative class of plaintiffs sought to avoid this rule by voluntarily dismissing their claims and purporting to file an appeal as of right as soon as certification was denied. *Id.* at 1712-13. The Court held that section 1291 barred this "device." *Id.* at 1712. It was "[o]f prime significance," the Court explained, that permitting this tactic would "undercut[] Rule 23(f)'s discretionary regime," and subvert the "measured, practical solutio[n]" the drafters had devised. *Id.* at 1714 (internal quotation marks omitted). Because the final judgment rule "is not a technical concept," but a "means [geared to] achieving a healthy legal system," the Court held that litigants could not undermine the Rules' "careful calibration" so easily. *Id.* at 1714-15 (quoting *Cobbledick*, 309 U.S. at 326).

The same principle applies here. If litigants could secure an immediate appeal in a multiple-claim case simply by filing their claims separately, they could (and surely would) sidestep the "measured, practical solutio[n]" Rule 54(b) devises for granting immediate appeals where justice so requires. That result would be particularly unacceptable given that the drafters made abundantly clear that certification was to be the "only" means of obtaining immediate appeal in a multiple-claim case, Fed. R. Civ. P. 54(b), and that they did not wish to "overturn the settled federal rule" prohibiting "piecemeal disposal of litigation," Fed. R. Civ. P. 54 advisory committee's note to 1946 amendment.

C. A Judgment Resolving Some But Not All Claims In A Case Consolidated For All Purposes Lacks The Hallmarks Of A Final Judgment.

Partial judgment in a case consolidated for all purposes also lacks the hallmarks of a "final decision" within the meaning of section 1291. This Court has consistently identified three basic features that all final judgments exhibit. Such decisions, the Court has held, must "disassociate[] [the court] from [the] case," *Swint*, 514 U.S. at 42, furnish a party's last effective opportunity for appeal, *Coopers & Lybrand*, 437 U.S. at 468, and leave undecided only questions that are "completely separate from the merits," *id.* The Court has insisted that "final decisions" exhibit these characteristics both in the ordinary course, and when identifying the "small class of orders" that qualify as final under the collateral order doctrine. *Firestone*, 449 U.S. at 374 (internal quotation marks omitted); *see supra* p. 17. A partial judgment in a fully consolidated case possesses none of these elements of finality.

1. An order resolving some but not all claims in a case consolidated for all purposes plainly does not "end[] the litigation on the merits," *Riley*, 553 U.S. at 419 (quoting *Catlin*, 324 U.S. at 233), or "disassociate[] [the court] from [the] case," *Swint*, 514 U.S. at 42. On the contrary, the "litigation" in every sense continues after such an order: The court has yet to resolve all the merits claims on the docket, conclude trial, or put an end to the consolidated proceedings. In the most basic sense, a judgment as to one claim in a consolidated case is not the court's "final deci-

sion[]" on the matters before it. 28 U.S.C. § 1291; *see id.* § 1292(b) (stating that appealable interlocutory orders are ones that "advance the ultimate termination of *the litigation*" (emphasis added)).

2. Nor is a partial order in a case consolidated for all purposes a party's last opportunity for appeal. After issuing such an order, a district court still must resolve the remaining claims in the consolidated action. And when it does so, it must enter a judgment. Fed. R. Civ. P. 58(b). Litigants will therefore have a clear opportunity to file an appeal from that order, in which they can raise claims of error from "all stages of the proceeding." *Cohen*, 337 U.S. at 546.

A partial judgment in a case consolidated for all purposes is thus unlike any order the Court has previously deemed final. With a typical final order, there is simply *no* further opportunity for the litigants to appeal: The district court "disassociates itself from [the] case," leaving no guarantee that it will issue another order from which a party can seek review. *Swint*, 514 U.S. at 42. In *Gelboim*, for instance, the Court placed substantial weight on the fact that a transferee court need not enter any judgment concluding an MDL, meaning that there may be no "event or order" that would trigger a party's right of appeal after the dismissal of its claims. 135 S. Ct. at 905. There is no such concern here; the court cannot resolve the remaining claims in a fully consolidated case without rendering a judgment of some kind. *See* Fed. R. Civ. P. 58(b).

What is more, a partial judgment in a consolidated case does not even satisfy the loosened criteria for an

appealable *collateral* order. The Court has said that an interlocutory judgment may be "final" within the meaning of section 1291 if it is "effectively unreviewable on appeal from a final judgment" because, for instance, the rights at stake would be irrevocably lost if review were delayed. *Coopers & Lybrand*, 437 U.S. at 468; *see Cobbledick*, 309 U.S. at 324-325. There is no argument, however, that an error regarding a run-of-the-mill claim in a consolidated case cannot be adequately rectified on later appeal. Just like any other request for relief, such a claim can be revived through reversal of the district court's order. A claim does not, simply by virtue of being part of a consolidated case, embody a right so important and imperfectly reparable on subsequent appeal as to require immediate review.

3. An order resolving just some claims in a fully consolidated case is also highly unlikely to be "independent of, and unaffected by," the merits of the remaining claims that have yet to be resolved. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 126 (1945); *see Brown Shoe Co.* v. *United States*, 370 U.S. 294, 308 (1962) (remaining claims must be "independent of, and subordinate to," claims already decided for the decision to be final). Quite the opposite: A decision on a single claim is likely to be "inextricably intertwined" with the merits of the remaining claims. *Cunningham* v. *Hamilton Cty.*, 527 U.S. 198, 205 (1999). As this Court has explained, that is a quintessential characteristic of a non-final judgment. In *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988), for example, the Court held that an order denying a motion to dismiss a case under the doctrine of *forum non conveniens* was non-final

because the resolution of that claim was not "completely separate from the merits" of the remaining claims in the case. *Id.* at 527 (quoting *Coopers & Lybrand*, 437 U.S. at 468). The Court explained that resolving that claim would prejudge the merits of the remaining claims, forcing "repetitive appellate review of substantive questions in the case." *Id.* at 528.

The same is true with respect to an order that resolves some but not all claims in cases consolidated for all purposes. As noted above, consolidated cases must present "common question[s] of law or fact," and in all-purpose consolidations those common questions ordinarily must be "central to the resolution of the cases." *Johnson*, 2010 WL 1692212, at *1 (internal quotation marks omitted); *see supra* p. 5. It is therefore exceedingly likely that the claims will raise "substantially overlap[ping] factual and legal issues" and that an appeal concerning one claim would prejudge the remaining claims that have yet to be considered. *Van Cauwenberghe*, 486 U.S. at 529.

To be sure, courts will sometimes resolve one claim in the consolidated case on grounds that have little or no bearing on the remaining claims. But the Court has repeatedly made clear that, in fashioning rules of appealability under section 1291, it makes categorical judgments, not "case-by-case determinations." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985); *Van Cauwenberghe*, 486 U.S. at 529 ("[W]e look to categories of cases, not to particular injustices."). And it is highly likely that, in the aggregate, partial judgments in fully consolidated

cases will turn on issues that are "enmeshed in the merits" of the claims that have yet to be decided. *Van Cauwenberghe*, 486 U.S. at 528. In the unusual cases in which the claims are independent, or in which it would be efficient to hear an immediate appeal before considering the remaining claims, parties may seek an appeal under Rule 54(b) and section 1292(b). *See infra* Part II.A.

D. Permitting Parties To Appeal Partial Judgments As Of Right Would Undermine The Purposes Of The Final Judgment Rule.

Granting parties an immediate appeal from partial judgment in a fully consolidated case would also thwart the purposes of the final judgment rule. This Court has made clear that the final judgment rule must be construed "in line with the[] reasons for the rule." *Microsoft*, 137 S. Ct. at 1712. And it has often consulted these purposes in determining whether a judgment is final. *See id.*; *Firestone*, 449 U.S. at 374; *Eisen*, 417 U.S. at 170-171. Here, all of the policies underlying the final judgment rule point in the same direction: Enabling immediate appeals as of right would encourage piecemeal appeals, deprive district courts of control over their dockets, and subject parties to the harassment of duplicative and wasteful appeals.

1. Authorizing separate appeals as of right in a fully consolidated case would result in a flurry of "piecemeal, prejudgment appeals" antithetical to "efficient judicial administration." *Mohawk*, 558 U.S. at 106 (quoting *Firestone*, 449 U.S. at 374). Indeed, even petitioner acknowledges as much. Br.

12-13 (acknowledging that "the concern about piecemeal appeals is valid" in some circumstances). And it is not hard to see why.

Where claims involve "a common question of law or fact" that overlaps so substantially that the district court deems consolidation for all purposes appropriate, it is highly likely that separate appeals would present "substantially overlap[ping] factual and legal issues," as well. *Van Cauwenberghe*, 486 U.S. at 529; *see supra* pp. 22-23. For example, multiple appeals might turn on how the law applies to a single transaction common to the claims. Or the appeals may require courts to consider closely related questions regarding the application of the same substantive legal standard. The court of appeals would inevitably be required to examine these common issues "more than once," *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8 (1980), and incur the resulting "disruption, delay, and expense" of fielding multiple duplicative appeals, *Richardson-Merrell*, 472 U.S. at 430.

Furthermore, the court of appeals would be required to adjudicate these questions without the benefit of the district court's full consideration of the issues presented. Allowing a district court to go first can furnish numerous efficiencies for the court of appeals. If a consolidated case proceeds to final judgment in the district court, the district court may identify some fundamental defect in all of the claims that would obviate the need for the appellate court to consider other issues. Or the district court may develop a factual record that illuminates the issues on review and enables more concrete application of

law to fact. *See* Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. Rev. 717, 797 (1995). Better still, the district court may identify a ground for rejecting a party's claims—for example, its inability to prove its claims at trial regardless of the merit of its legal arguments—that will eliminate the need for appellate review altogether.

Permitting immediate appeals as of right from partial judgments would eliminate these efficiencies. It would require appellate courts to decide more appeals, involving more difficult legal questions, on worse records. The final judgment rule reflects a congressional determination that judicial administration is better served by avoiding such a haphazard system. *Cobbledick*, 309 U.S. at 324-325. And the wisdom of that determination is reinforced by this Court's longstanding admonition that courts should not decide difficult questions except where necessary, and even then in the context of as concrete a dispute as possible. *See United Pub. Workers of Am. (C.I.O.)* v. *Mitchell*, 330 U.S. 75, 89 (1947).[5]

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[5] To be sure, there are occasionally circumstances in which efficiency is better served by an immediate appeal—where, for instance, an appeal would resolve an important question of law that could simplify proceedings in the district court. The same possibility exists, however, in every case involving multiple claims. And Congress and this Court chose to account for that possibility not by indiscriminately authorizing appeals as of right, but by developing a regime of discretionary appeals that enables courts to properly separate the wheat from the chaff.

2. Permitting immediate appeals as of right from orders resolving some but not all claims in fully consolidated cases also would "encroach[] upon the prerogatives of district court judges." *Mohawk*, 558 U.S. at 106. When a district judge consolidates cases for all purposes, the judge has determined that the "common question[s] of law or fact" implicated by the cases should be handled together at all phases of the litigation. Fed. R. Civ. P. 42(a). Requiring immediate appeals as of right from partial decisions, however, would undermine the judge's consolidation order. An appeal would decouple the consolidated cases: The district court would no longer have jurisdiction over the claims that were appealed, and the cases would then proceed on different tracks—one track in the district court, and one track (or more) in the court of appeals. That would severely undermine "Congress' judgment that the *district judge* has primary responsibility" to manage the litigation prior to the entry of final judgment on all claims. *Richardson-Merrell*, 472 U.S. at 436; *see* 2016 Year-End Report on the Federal Judiciary 7 (describing benefits of "[a] district judge's skillful exercise of docket administration and case management").

Permitting appeals as of right from partial judgments would also undermine the district court's role as the "dispatcher" who "determine[s] the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright*,

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As discussed below, those mechanisms fully account for the atypical case in which an immediate appeal is desirable. *See infra* Part II.

446 U.S. at 8 (quoting *Mackey*, 351 U.S. at 435). The district court holds that role because of its "intimate knowledge" of the case. *Id.* at 12. But requiring immediate appeals would turn district judges from dispatchers to helpless bystanders. It would force litigants to take appeals that unglue claims from the district judge's consolidation order. That would contravene the district judge's judgment, based on his or her "familiar[ity]," *Mackey*, 351 U.S. at 437, with "all the facets of a case," that the cases should remain together for all purposes, *Curtiss-Wright*, 446 U.S. at 12.

For that reason, requiring immediate appeals undercuts not only the aims of section 1291, but also Rule 42(a)'s regime for managing litigation through consolidation. Permitting appeals as of right from partial judgments in fully consolidated cases would turn Rule 42(a) into a half-measure, running roughshod over the district court's authority to keep cases together for all proceedings from start to finish. The evisceration of Rule 42(a)'s consolidation regime is yet another reason that the final judgment rule cannot permit immediate appeals from orders resolving some but not all claims in a case consolidated for all purposes.

3. Enabling an appeal from an order resolving only some claims in fully consolidated cases also would result in "the harassment and cost of a succession of separate appeals." *Cobbledick*, 309 U.S. at 325. Rather than confronting a single appeal that presents all of the issues simultaneously, parties may be required to litigate separate appeals on different timelines, even for closely related issues. Parties

also may be required to litigate their claims in two fora simultaneously, escalating the cost of litigation.

Permitting separate appeals would also increase the unfairness to the parties whose cases continue in the district court during the "succession of separate appeals." *Id.* The court of appeals may resolve issues in which the parties in the district court have an interest. But the court of appeals would do so in a proceeding in which the parties in the district court have no role. That is a problem, because the court of appeals' judgment likely would have preclusive or even precedential effect on the claims still pending in district court. And it is particularly problematic because the claims to reach the appellate courts first are likely the "weakest" ones, and thus the worst vehicles to test legal issues applicable to a consolidated case as a whole. *Gelboim*, 135 S. Ct. at 906. Such a system would "impose[] a risk of prejudice on the parties whose cases continue at the trial level" but who are not able to participate as parties in the appeal. Steinman, *supra*, at 797.

4. Finally, a regime of intermediate appeals is likely to result in less clarity as to the timing of appeal. "This Court *** has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination." *Richardson-Merrell*, 472 U.S. at 439. "[A]dministrative simplicity is a major virtue in a jurisdictional statute," and "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

The rule advanced by respondents achieves that aim by establishing a bright-line rule for cases

consolidated for all purposes: No "final decision" is issued for purposes of section 1291 until the district court has issued a judgment as to all pending claims in the fully consolidated case. That rule provides clear guidance to litigants. And it obviates the need for parties to file protective appeals that unnecessarily burden the dockets of the courts of appeals.

The rule advanced by petitioner, by contrast, does not make clear the deadline for filing an appeal. Once cases have been consolidated for all purposes, it can be difficult to disentangle them from one another. Often, a single docket will become the authoritative repository for filings in the consolidated actions. And the claims from various cases will have been treated together throughout the litigation. Under these circumstances, it may prove difficult—especially in more complex consolidated cases—for litigants to determine exactly when all the claims in their original case have been resolved. In those circumstances, parties may fail to realize before it is too late that the 30-day appeal clock has started to run.

II. THREE DIFFERENT SAFETY VALVES ENABLE PARTIES TO OBTAIN DISCRETIONARY REVIEW OF PARTIAL JUDGMENTS WHERE APPROPRIATE.

Although litigants lack an appeal as of right from partial judgment in a fully consolidated case, they do not lack *any* opportunity for appeal. Three different "safety valve[s]" enable parties to obtain a discretionary appeal where efficiency and equity most warrant it. *Mohawk*, 558 U.S. at 111. These mechanisms confirm that adhering to the established

practice in multiple-claim cases would not work any injustice on litigants. In contrast, the convoluted system petitioner proposes to sand off the rough edges of her rule only confirms that standard's unworkability.

A. Parties May Seek Discretionary Appeal Under Rule 54(b), Section 1292(b), And Mandamus.

Congress and this Court have long recognized that the final judgment rule may sometimes render harsh results in multiple-claim cases. As the Court explained in *Mackey*, the Federal Rules created "increased opportunity for the liberal joinder of claims in multiple claims actions." 351 U.S. at 432. But that in turn necessitated "relaxing the restrictions" upon appealing such claims. *Id.* "Sound judicial administration" dictates that in particularly sprawling actions, "some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all of the claims." *Id.* Otherwise parties might face "hardship and denial of justice" while "await[ing] the determination" of adjudication of the case as a whole. *Dickinson*, 338 U.S. at 511; *see Gelboim*, 135 S. Ct. at 902.

These concerns apply to fully consolidated actions no less than to other multiple-claim cases. There are some circumstances in which justice or efficiency will be best served by allowing a litigant to file an appeal before a consolidated case as a whole has concluded. A particular claim may be sufficiently *independent* of the remainder of the suit that delay would serve no beneficial purpose, while imposing great costs on the litigant. A claim may also be dismissed on a ground

sufficiently *important* to the litigation as a whole that it would be most efficient to resolve it quickly. And a district court may have *erred* so substantially that it would be appropriate for a court of appeals to swiftly correct the error.

Three existing, well-established legal mechanisms—Rule 54(b), section 1292(b), and the writ of mandamus—respond to all of these concerns. Each one is available to litigants seeking immediate appeal in fully consolidated cases. And together they provide for the principal circumstances in which immediate appeal is efficient and fair.[6]

1. Rule 54(b) was specifically designed to enable appeals from partial judgment in multiple-claim cases. As previously described, this provision permits a district court to authorize immediate appeal of a decision concerning "one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). As the drafters explained, this provision sought to avoid the "possible injustice of a delay in judgment on a *distinctly separate* claim to await adjudication of the entire case." Fed. R. Civ. P. 54 advisory committee's note to 1946 amendment (emphasis added). Its aim is thus to permit immedi-

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[6] Parties concerned about the effects of consolidation on their appeal rights also may seek an immediate appeal of the consolidation order itself, either through section 1292(b) or a writ of mandamus. *See, e.g.*, 2 Motions in Federal Court 8:46 (3d ed. 2017 update); *see also Garber* v. *Randell*, 477 F.2d 711, 715 n.2 (2d Cir. 1973); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir. 1961).

ate appeal of claims sufficiently *independent* from the merits of the remainder of the case as to justify appeal.[7] *Curtiss-Wright*, 446 U.S. at 8; *Mackey*, 351 U.S. at 436-437.

This Court has made clear that Rule 54(b) certification is available in fully consolidated cases. In *Mackey*, the Court indicated that the relevant "judicial unit" for purposes of section 1291 and Rule 54(b) is the same: As it explained, Rule 54(b) "administers" section 1291's final judgment "requirement in a practical manner in multiple claims actions and does so by rule instead of judicial decision." 351 U.S. at 438. And in *Cold Metal Process Co.*, the Court held that a claim and a counterclaim filed in separate "action[s]" and placed on separate dockets were a "single judicial unit" for purposes of section 1291 and Rule 54(b) alike, and that Rule 54(b) accordingly was available when a court had entered judgment on one but not the other. 351 U.S. at 448, 451. *Gelboim* is to the same effect: It suggested that Rule 54(b) certification may be available in "cases consolidated for all purposes involving closely related issues." 135 S. Ct. at 906 n.7. The import of these cases is clear: Rule 54(b) provides a route to appeal if a matter

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[7] Courts have developed legal standards—which are in turn subject to appellate review—for determining whether such appeals are appropriate. *See, e.g.*, *Braswell Shipyards, Inc.* v. *Beazer East, Inc.*, 2 F.3d 1331, 1335-36 (4th Cir. 1993); *Solomon* v. *Aetna Life Ins. Co.*, 782 F.2d 58, 61 n.2 (6th Cir. 1986); *Allis-Chalmers Corp.* v. *Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975), *abrogated on other grounds by Curtiss-Wright*, 446 U.S. 1.

involving multiple claims would constitute a single judicial unit under section 1291.[8]

Indeed, the Federal Rules themselves link Rule 42(a) and Rule 54(b). The advisory committee notes to Rule 42 explicitly direct the reader to "Rule 54(b)" for cases involving "entry of separate judgments." Fed. R. Civ. P. 42 advisory committee's note to 1937 adoption. It is difficult to discern what the drafters could have meant by this cross-reference if not that Rule 54(b) was available at least in some consolidated cases.

Petitioner argues (at 17) that Rule 54(b) cannot authorize immediate appeal in consolidated cases because Rule 54(b) only permits appeals from a single "action," and a fully consolidated case does not become a single "action." This argument merely reiterates petitioner's mistaken contention that consolidated cases must remain for all purposes separate judicial units. The Court has made clear that section 1291 and Rule 54(b) have a common scope. Since consolidated cases become a single unit for purposes of section 1291, *see supra* pp. 22-27,

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[8] The courts of appeals have also almost uniformly recognized that Rule 54(b) certification is available in fully consolidated cases. *Hageman* v. *City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988); *Bergman*, 860 F.2d at 567; *Ringwald*, 675 F.2d at 771; *Sandwiches, Inc.* v. *Wendy's Int'l, Inc.*, 822 F.2d 707, 709-710 (7th Cir. 1987); *McCuen* v. *Am. Cas. Co. of Reading*, 946 F.2d 1401, 1411 (8th Cir. 1991); *Huene*, 743 F.2d at 703; *Trinity Broad. Corp.*, 827 F.2d at 675; *Fla. Wildlife Fed'n, Inc.*, 737 F.3d at 692-693; *U.S. ex rel. Hampton*, 318 F.3d at 216; *Spraytex, Inc.*, 96 F.3d at 1382.

then they naturally do so for purposes of Rule 54(b) as well.

Petitioner suggests (at 17) that understanding consolidated cases as one "action" for purposes of Rule 54(b) would lead to a cascade of undesirable consequences. That is incorrect. For one thing, the fact that a fully consolidated case is a single "action" for purposes of Rule 54(b) does not mean that it must be one "action" for every other conceivable purpose under the Rules. The final judgment rule is given a uniquely "practical *** construction" that need not control in every context. *Mohawk*, 558 U.S. at 106 (internal quotation marks omitted). Indeed, it is clear that Rule 54(b) does *not* use "action" the same way as every other Rule. It provides that a court "end[s] the action" when it "adjudicat[es] all the claims and all the parties' rights and liabilities," Fed. R. Civ. P. 54(b), even though an action may continue for other purposes, such as to adjudicate attorney's fees. *See Ray Haluch Gravel*, 134 S. Ct. at 779-780.

Furthermore, the supposed horribles petitioner describes (at 20) are either unobjectionable or unrelated to respondents' reading. Treating fully consolidated cases as a single action for purposes of other Federal Rules would yield efficiencies consistent with the purposes of consolidation: It would, for instance, reduce the number of pleadings in a consolidated case, *see* Fed. R. Civ. P. 12, and streamline discovery by reducing the number of requests propounded, *see* Fed. R. Civ. P. 30-36. The notion that this reading would have jurisdictional consequences is simply incorrect; each claim in a multiple-claim action must be considered independently for jurisdictional pur-

poses regardless. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (citing *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)). Likewise, service of process almost invariably precedes a consolidation order, and so would be unaffected by the scope or import of such an order. The practical consequences for settlement and voluntary dismissal would also be minimal—nothing would stop parties to a particular claim from reaching a contractual agreement not to proceed, and when that happens the Rules authorize the court to remove the relevant claims, either by formally dismissing them or permitting an amended complaint omitting them. *See* Fed. R. Civ. P. 15(a)(2), 41(a)(2).

2. Section 1292(b) provides another safety valve that enables immediate appeal in fully consolidated cases. That provision states that a district court may certify that "an order not otherwise appealable * * * involves a controlling question of law as to which there is a substantial ground for difference of opinion" and from which "immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If the district court does so, the court of appeals "may * * * in its discretion[ ] permit an appeal to be taken from such order." *Id.*

This provision thus authorizes appeal from *important* questions of law. *See Swint*, 514 U.S. at 46 (stating that the provision enables review of "orders deemed pivotal and debatable"); *McFarlin* v. *Conseco Servs., LLC*, 381 F.3d 1251, 1255-59 (11th Cir. 2004) (describing legal standard). There is no question that it is available in a fully consolidated case, like any other: The only precondition for invocation of the statute is that the order be "not otherwise ap-

pealable" as an interlocutory order. 28 U.S.C. § 1292(b). And this provision thereby addresses the atypical circumstance in which a judgment on one claim in a consolidated case is sufficiently important that it would be more efficient, rather than less, to send it directly up to appellate review. If both the district court and the court of appeals think a question sufficiently critical that an early appeal is proper, then section 1292(b) provides an avenue for them to grant an appeal.

3. Finally, mandamus review enables courts of appeals to immediately review "clear and indisputable" errors of law for which there is no adequate alternative means of appeal. *Cheney*, 542 U.S. at 380-381. "Th[is] hurdle[ ], however demanding, [is] not insuperable." *Id.* at 381. The Court has repeatedly recognized that mandamus remains a "safety valve for" courts of appeals to "promptly correct[ ] serious errors" in proceedings before final judgment is issued. *Mohawk*, 558 U.S. at 111 (internal quotation marks and alteration omitted). It therefore provides some comfort that in the case of a manifest *error* of law, a litigant is not required to wait until the conclusion of the proceeding as a whole to see it corrected.

B. There Is No Established Or Workable Means Of Making Exceptions To Petitioner's Rule.

Petitioner, in contrast, cannot identify any plausible means of making exceptions to her rule. As petitioner recognizes (at 13-15), her rule cannot be absolute. Requiring parties to take an appeal from *every* judgment entered with respect to a portion of a

consolidated case would be inefficient and unfair. As noted above, immediate appeals from partial judgment will often lead to duplicative proceedings, compel appellate courts to resolve issues intertwined with the merits of remaining claims, and present difficult legal questions that may be obviated by further proceedings. Mandating such appeals also may decouple a claim from the rest of the consolidated case, loosen the district court's control over its docket, and subject opposing parties to duplicative and wasteful litigation. *See supra* Part I.D.

Even petitioner, then, must concede that, "[i]n appeals from *some* consolidated cases, * * * concern[s] about piecemeal appeals [are] valid." Br. 12. But petitioner cannot identify any workable means of separating the many cases in which immediate appeals would be wasteful from the few in which they might be beneficial.

Petitioner's best attempt at such a system is as follows: In her view, litigants must immediately appeal every partial judgment in a fully consolidated case; otherwise, the 30-day appeal clock would run, foreclosing any future appeal. Br. 13. The court of appeals must then "manage" the case by deciding whether to "stay the appeal, pending resolution of the other, non-final, cases that were consolidated with the case on appeal." *Id.* And to make that determination, the court of appeals is to carefully examine the district court record and decide how "distinct" the different issues are, whether the cases "should have been * * * filed as a single case," and what the "prejudice" to the litigant might be from delay. *Id.* at 14 n.11.

This system is deeply flawed. *First*, it places the decision about whether an immediate appeal is appropriate in the hands of the wrong tribunal. Recognizing the "special role" that district courts play "in managing ongoing litigation," *Mohawk*, 558 U.S. at 106 (quoting *Firestone*, 449 U.S. at 374), Congress and this Court have long accorded district judges pride of place in determining when an appeal is appropriate. *See Curtiss-Wright*, 446 U.S. at 8. Indeed, the U.S. Code and the Federal Rules consistently make district courts the gatekeepers to the courts of appeals. *See, e.g.*, Fed. R. Civ. P. 54(b) (authorizing district courts to determine whether "there is no just reason for delay[ing]" entry of a partial final judgment); 28 U.S.C. § 1292(b) (authorizing district courts to determine whether an interlocutory order is suitable for review); *id.* § 1915(a)(3) (authorizing district courts to determine whether an *in forma pauperis* appeal would be "taken in good faith").

Congress and this Court have vested authority with the district courts for a simple reason: District courts are "most likely to be familiar with the case and with any justifiable reasons for delay." *Mackey*, 351 U.S. at 437. Petitioner has offered no reason why the courts of appeals would be better suited to this task than district courts, which "can explore all the facets of a case," *Curtiss-Wright*, 446 U.S. at 12, and—in consolidating cases for all purposes—will have already determined that the cases are closely related. Indeed, it is difficult to imagine how a court of appeals could practicably make the decisions petitioner's rule would require; having no familiarity with the record, it could not easily determine the

relationship between the different claims and the prejudice to the petitioner, at least not without a wholly wasteful outlay of judicial resources.

Second, there is no discernible legal standard governing the court of appeals' determination to stay a case. Courts have "inherent authority to manage their dockets." *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016). As a result, they enjoy "an ample degree of discretion" in managing their calendars, and the factors they may consider are wide-ranging and "equitable in nature." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-184 (1952). This Court has declined to intrude on that authority even in situations where it has expressed serious "concerns" about delay. *See In re Blodgett*, 502 U.S. 236, 240 (1992) (per curiam) (declining to issue a writ of mandamus to the Ninth Circuit despite its failure to render a decision in a death penalty case for two-and-a-half years).

Accordingly, petitioner's solution would turn a party's appeal rights over to largely unconstrained and unreviewable judicial discretion. That is not the way the system has ever worked: Courts' obligation to hear cases within their jurisdiction is "virtually unflagging." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). And such a system would substantially dilute the right to appeal that section 1291 guarantees.

By contrast, Rule 54(b) and section 1292(b) provide articulated, reviewable guidance about when an appeal of part of a consolidated case may go forward. *See, e.g.*, *Curtiss-Wright*, 446 U.S. at 8 & n.2. And if a district court errs in the application of those stand-

ards, a litigant can seek abuse-of-discretion review in the court of appeals.

In the end, it is not surprising that petitioner's solution, but not respondents', suffers from these substantial problems. Congress and this Court have developed a detailed scheme for making exceptions to the final judgment rule because their understanding, for decades, has been that a single appeal from final judgment is the norm in multiple-claim cases. *See supra* Part II.A. No one has thought it necessary to devise a scheme that does the reverse—that is, that makes exceptions to a heretofore unknown system of immediate appeals in multiple-claim cases. This Court should not undertake the task of devising such a scheme from scratch, relying on interstitial judicial authority intended for other purposes. The proper rule is what it has long been: A party must wait until final judgment in the case as a whole before lodging an appeal as of right.

III. PETITIONER'S APPEAL IS PREMATURE.

Under the correct rule of law, petitioner appealed too soon.

It is undisputed that the District Court consolidated Elsa's and Samuel's claims "for all purposes." Pet. App. A-4. The court ordered without qualification that the two actions "be consolidated" and instructed that all future submissions be filed on a single docket. Pet. App. A-15. The District Court then conducted all subsequent proceedings jointly: It issued a single trial management order, held a joint trial, and gave the jury a single verdict form for all claims. *See* J.A. 4, 163-172; Pet. App. A-4, A-8.

Nonetheless, Elsa appealed at a time when the District Court had entered final judgment on some, but not all, of the claims in that fully consolidated case. At the time of Elsa's appeal, Elsa had a pending motion for a new trial in the District Court. J.A. 10. And before the Court of Appeals heard her appeal, the District Court had granted that motion and begun holding a new trial—proceedings that have not concluded even today. J.A. 13; Cert. Reply 1. Hence, as the Third Circuit explained, "Samuel's claims against Elsa remain outstanding," and so final judgment has not yet been entered in the case as a whole. Pet. App. A-7.

Consequently, petitioner does not yet have an appeal as of right. Petitioner was entitled to seek *discretionary* appeal pursuant to Rule 54(b)—something that even her own counsel conceded below. Pet. App. A-9 n.11. But for reasons of her own, petitioner declined to do so. Having foregone that opportunity, she must wait until a final judgment is entered terminating all claims in the consolidated case before appealing.

Indeed, this case illustrates the wisdom of delaying appeal until final judgment in the consolidated case as a whole. As the Court of Appeals explained, Elsa's claims substantially overlap with Samuel's: "Witnesses such as Samuel and Elsa would inevitably testify in a suit involving either set of claims, and both sets of claims may turn on" various questions regarding Ethlyn's state of mind and the nature of Samuel's "lease renegotiation." Pet. App. A-8. The Court of Appeals' consideration of the pertinent legal issues will benefit from the District Court's resolu-

tion of the "hotly contested and complex" factual disputes in the case. Pet. App. A-3 n.1. And the District Court's determination of any underlying legal questions common to both claims may simplify the issues on appeal. In these circumstances, as in many others, it is appropriate to require the parties to wait until final judgment so that the pertinent issues, and the consequent expenditure of judicial resources, can be managed in a single combined appeal.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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DECEMBER 2017

ADDENDUM

ADDENDUM

STATUTORY PROVISIONS INVOLVED

1. **28 U.S.C. § 1291 provides:**

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. **28 U.S.C. § 1292 provides in pertinent part:**

Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except

where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

1. **Federal Rule of Civil Procedure 42 provides:**

Consolidation; Separate Trials

(a) *Consolidation.* If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) *Separate Trials.* For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

2. **Federal Rule of Civil Procedure 54 provides:**

Judgment; Costs

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) *Judgment on Multiple Claims or Involving Multiple Parties.* When an action presents more than one

claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) *Demand for Judgment; Relief to Be Granted.* A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) *Costs; Attorney's Fees.*

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) *Attorney's Fees.*

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law re-

quires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

No. 16-1150

In The
Supreme Court of the United States

ELSA HALL,
As Personal Representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

SUMMARY OF ARGUMENT

As required by Fed. R. Civ. P. 58(b)(1), the district court entered a final judgment in petitioner's case that "ordered" that "the action" be "dismissed on the merits." A-12. The order was entered on the docket *only* in Case No. 11-54 and did not include the caption of the consolidated case (Case No. 13-95).[1] Thereafter, the district court denied the respondents' motion for attorneys' fees because they had not filed their motion for fees within fourteen days of entry of the final judgment as required by Fed. R. Civ. P. 54(d)(2)(B)(i).[2] The judgment in this case is the classic final judgment: It terminated the action and there was no other action for the district court to take. The final judgment rule, embodied in 28 U.S.C. § 1291, unambiguously provides a right of appeal from a final judgment.

Respondents are unable to avoid the plain language of Section 1291 and instead engage in linguistic

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[1] Likewise, the judgment on the jury verdict in favor of Samuel Hall and against Elsa Hall in her individual capacity was entered solely in Case No. 13-95 and bore that case's caption only.

[2] Rule 54(d)(2)(B)(i) requires that the motion be filed within fourteen days of "judgment." Fed. R. Civ. P. 54(a) defines "judgment" as "a decree and any order from which an appeal lies." *See also Brown v. Local 58, Int'l Bhd. of Elec. Workers, AFL-CIO*, 76 F.3d 762, 767 (6th Cir. 1996) (holding that an attorney fee motion must be filed within fourteen days of an order from which an appeal lies).

gymnastics in an effort to deny petitioner the right of appeal from a final judgment provided by Section 1291. To do so, they must first interpret Fed. R. Civ. P. 42 in a manner that denies a party with a final judgment of its substantive right to appeal—in direct contravention of the Rules Enabling Act. They must then subvert the purpose of Fed. R. Civ. P. 54(b), which is designed to *increase* the availability of appeals in certain cases in which a final judgment *has not* been entered. Respondents turn Rule 54(b) on its head and seek to use it to *limit* the availability of appeals in cases where a final judgment *has* been entered.

Respondents also raise the specter of various and sundry problems that they envision will arise if appeals from final judgments in consolidated cases are allowed. These perceived concerns do not justify ignoring the plain language of Section 1291. Further, these strawman concerns are illusory. Despite the benefit of a collective seventy-five years of jurisprudence from the First and Sixth Circuits, both of which allow such appeals,[3] respondents are unable to provide examples that show that the troubles they conjure up are real. The phantom specter disappears under scrutiny.

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[3] *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir.1972) (treating all consolidated cases as separate for purposes of appellate jurisdiction) and *Kraft, Inc. v. Local Union 327, Teamsters, Chauffeurs, Helpers & Taxicab Drivers*, 683 F.2d 131, 133 (6th Cir. 1982) (stating that it is "beyond peradventure" that a summary judgment dismissing one action in two consolidated cases was a final appealable order "inasmuch as the consolidation of both actions below did not merge the suits into a single cause").

ARGUMENT

Respondents' argument hinges upon three independent building blocks:

- that "final judgment" no longer means what this Court has repeatedly said it means;
- that a Rule 42 consolidation can deprive a party of a substantive right—the right to an appeal from a final judgment—when the Rules Enabling Act prohibits the federal rules from abridging or modifying a party's rights; and
- that Rule 54(b) of the Federal Rules of Civil Procedure applies in a case that has been dismissed in its entirety but is consolidated with a case that remains pending.

Removal of any one of these building blocks causes respondents' entire argument to collapse.

A. Respondents can avoid the final judgment rule only by redefining the Court's firmly-established definition of "final judgment."

For at least 135 years, this Court has defined a final judgment as a judgment that "disposes of the whole case on its merits." *Bostwick v. Brinkerhoff*, 106 U.S. 3, 4 (1882). Most recently, the Court noted that while it gives a "practical rather than a technical construction" to the phrase "final decision" used in 28 U.S.C. § 1291, "the statute's core application is to rulings that terminate an action." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015). While this "practical construction" has sometimes *expanded* the "core application" to a limited category of collateral

orders, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court has never *eroded* the core. It has never denied an appeal from a judgment that disposes of a whole case on the merits. The plain language of 28 U.S.C. § 1291 constrains the Court from doing so.

The "core" definition of "final judgment" is a judgment that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Such a final judgment puts a party "effectively out of court." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 11, n.11(1983). One indicia of a final judgment is that the district court "disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

The judgment at issue in this case falls within this core definition of the final judgment rule. The district court "dismissed" petitioner's "action" "on the merits." There was nothing further that the court could do to adjudicate the merits of the case. And, if there was any doubt that the district court considered its order to be final, that doubt was erased by its order denying respondents' motion for attorneys' fees because they failed to file the motion within fourteen days of the entry of final judgment as required by Fed. R. Civ. P. 54(d)(2)(B)(i). *Hall v. Hall*, 2016 WL 8650484, *8 (Mar. 30, 2016) (Doc. No. 452).

Because the district court entered a final judgment, the plain language of 28 U.S.C. § 1291 gave petitioner a right of appeal. There should be no need for further inquiry.

B. The Rules Enabling Act, consistent with this Court's decision in *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933), does not allow the consolidation of cases to deprive a party of a substantive right. Respondents argue that the consolidation in this case prevents petitioner from appealing a final judgment. Because the Section 1291 right of appeal is a substantive right, respondents' argument must fail.

Respondents cannot dispute that absent the consolidation of this case with another, the final judgment in this case would be appealable as of right under Section 1291. Thus, they are forced to argue that the court order consolidating the two cases altered the character of petitioner's case and thereby deprived her of the right to appeal granted by Section 1291. However, a court rule cannot modify a litigant's substantive rights. Consequently, respondents' argument cannot prevail.

The Rules Enabling Act, now codified at 28 U.S.C. § 2072, prevents federal courts from adopting rules that "extend or restrict the jurisdiction conferred by a statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).[4] *Accord Snyder v. Harris*, 394 U.S. 332, 337–38

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[4] *Sibbach* interpreted the original version of the Rules Enabling Act, (Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. 723b). There is no material difference between the original version, which provided that the federal rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant") and the current version, found at 28 U.S.C. § 2072(b).

(1969) (holding that the interpretation of the diversity of jurisdiction statute cannot be changed by a change in the rules). Rule 82 of the Federal Rules of Civil Procedure reinforces this premise with the admonition that "[t]hese rules do not extend or limit the jurisdiction of the district courts."

One year before the adoption of the Rules Enabling Act, this Court decided *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933) and stated that consolidation "does not merge the suits into a single cause, *or change the rights of the parties*, or make those who are parties in one suit parties in another." (Emphasis added.)[5] Respondents urge the Court to ignore its holding in *Johnson* because the case predates the promulgation of the Federal Rules of Civil Procedure. But, that argument sails wide of the mark. The premise of *Johnson*—that procedural rules cannot modify substantive rights—was engraved in statute one year later with the passage of the Rules Enabling Act with its express prohibition against rules that modified a party's rights. Thus, it does not matter whether cases are consolidated "for discovery," "for hearings," "for pre-trial purposes," "for trial," or "for all purposes." No matter how a court characterizes the

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[5] In the consolidated proceeding below, the district court did not treat the underlying cases as if they were merged. The final judgment in petitioner's case, Pet. App'x A-12, ordered that "the action be dismissed." After consolidation, the two cases still retained their status as independent actions.

consolidation, it cannot abridge the rights of a party.[6]

Rule 82 of the Federal Rules of Civil Procedure provides an independent reason why a Rule 42 consolidation cannot preclude an appeal from a final judgment entered in one case of a consolidated proceeding. Rule 82 provides that the Federal Rules of Civil Procedure do not "extend" the jurisdiction of the district courts. The filing of a notice of appeal from a final judgment confers jurisdiction in the court of appeals and divests the district court of jurisdiction. *Griggs v. Provident Consumer Discount*, 459 U.S. 56, 58 (1982). An interpretation of Rule 42 that bars an appeal when a final judgment is entered in one of the cases subject to consolidation would extend the

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[6] Even if the respondents were correct that a consolidation "for all purposes" could deprive a party of a right of appeal from a final judgment, such a rule would not apply to this case. Contrary to respondents' assertions, the district court did not consolidate the cases for all purposes or treat them as a unit. The magistrate-judge entered the consolidation order without stating the scope of the consolidation. Pet. App'x A-14. The district court maintained separate dockets for each case and on February 4, 2015, separate judgments were entered in each case. *Cf. Swanigan v. City of Chicago*, 775 F.3d 953, 963 n.4 (7th Cir. 2015) (concluding that where the district court consolidated two cases but maintained separate docket numbers and disposed of the cases by separate judgments at separate times, the cases were not completely merged).

The district judge treated the scope of the magistrate judge's consolidation order as consolidating the cases for trial, as evidenced by the entry of the separate judgments and then its decision denying respondents' motion for an award of attorneys' because they did not file the motion within fourteen days of entry of the final judgment as required by Fed. R. Civ. P. 54(d)(2)(I).

jurisdiction of the district court and thereby run afoul of Rule 82.

C. A Rule 42 consolidation does not merge cases into a single unit for *any* purpose.

The cases recognizing the continuing vitality of *Johnson* and holding that consolidation does not merge cases into a single unit are legion.[7] Yet, some of the same circuits that recognize the continuing validity of *Johnson* carve out an exception when it comes to an appeal from a final judgment in a consolidated case. *Compare* the Third Circuit's statement in *Cella*, 173 F.3d at 912 that *Johnson* "remains the authoritative statement on the law of consolidation" with *Bergman v. City of Atl. City*, 860 F.2d 560, 567 (3d Cir. 1988) (concluding that "*Johnson* does not require this court

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[7] *See, e.g., In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972)(citing *Johnson* for the proposition that consolidation does not merge cases into single causes or change the rights of the parties); *Cole v. Schenley Indus., Inc.*, 563 F.2d 35, 38 (2d Cir. 1977) (citing *Johnson* and recognizing that "consolidation cannot effect a merger of the actions" or "change the rights of the parties in separate suits"); *Cella v. Togum Constructeur Ensemleier en Industrie Alimentaire*, 173 F.3d 909, 912 (3d Cir.1999) (same and stating that *Johnson* "remains the authoritative statement on the law of consolidation (quotation omitted)); *Intown Prop. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 168 (4th Cir.2001) (citing *Johnson* for the principle that consolidation "does not merge the suits into a single cause, or change the rights of the parties"); *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982) (same); *Lewis v. ACB Bus. Serv., Inc.*, 135 F.3d 389, 412 (6th Cir. 1998) (same); *United States v. Altman*, 750 F.2d 684, 695 (8th Cir.1984) (same); *Lewis v. City of Los Angeles*, 5 F. App'x 717, 718 (9th Cir. 2001) (same);

to hear an appeal of one of two consolidated actions"); or the Fifth Circuit's decision in *McKenzie*, 678 F.2d at 574 (citing *Johnson* for the proposition that "consolidation does not cause one civil action to emerge from two; the actions do not lose their separate identity") with *Rd. Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.*, 967 F.2d 145, 149 (5th Cir. 1992) (distinguishing *Johnson* because "it predates the Federal Rules of Civil Procedure and did not involve any issue relating to the finality of a judgment as a predicate for appellate jurisdiction").

As noted in petitioner's opening brief (Pet. Br. 19–20) and undisputed by either respondents or *amici*, the application of many different aspects of federal procedure would change dramatically if Rule 42 merged cases. Consolidated cases either retain their separate identity—or they are merged—there is no logical middle ground. Yet, the courts have gerrymandered Rule 42: Cases retain separate identity and are not merged for purposes of Fed. R. Civ. P. 4 (service of process);[8] jurisdiction;[9] Fed. R. Civ. P. 15(c) (relation back of amended pleadings);[10] Fed. R. Civ. P. 41(a)(1)(A)(ii) (voluntary dismissals);[11] Fed. R. Civ. P.

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[8] *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.).

[9] *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976).

[10] *Bailey v. N. Ind. Pub. Serv. Co.*, 910 F.2d 406, 413 (7th Cir.1990).

[11] *United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984).

24 (intervention);[12] Fed. R. Civ. P. 68 (offers of judgment);[13] and settlement;[14] yet, some circuits create an outlier for appeals from a final judgment in a consolidated case and hold that Rule 42 merges the cases for appeal purposes. This anomaly arises only within certain circuits. This Court should restore uniformity—and eliminate this eccentricity—in the interpretation of Rule 42.

D. Fed. R. Civ. P. 54(b) is inapplicable.

Respondents and *amici* devote most of their briefs to Rule 54(b) appeals and the perceived benefits of Rule 54(b) (from the perspective of judicial management rather than the litigants impacted by the rule). They immediately run into a roadblock, however, because *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431 (1956) establishes beyond peradventure that when a party's complaint is dismissed in its entirety, Rule 54(b) is inapplicable. As *Gelboim* explained, Rule 54(b) applies to interlocutory rulings and "there is nothing 'interlocutory' about [a] dismissal order." *Gelboim*, 135 S.Ct. at 906. Even if the application of Rule 54(b) to final judgments in consolidated cases had the advantages ascribed to it by respondents, the plain language of Section 1291 must govern. *Demarest v.*

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[12] *Changzhou Hawd Flooring Co. v. United States*, 986 F. Supp. 2d 1372, 1377 (Ct. Int'l Trade 2014).

[13] *Cover v. Chicago Eye Shield Co.*, 136 F.2d 374, 376 (7th Cir. 1943).

[14] *State Mut. Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979).

Manspeaker, 498 U.S. 184, 190 (1991) (a court may depart from the terms of an unambiguous statute only in "rare and exceptional circumstances").

Respondents assert that *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956), which was decided on the same day as *Mackay*, supports their position. They state that *Cold Metal Process* "held that [Rule 54(b)] applied where multiple claims were filed as different actions and later joined together." Resp. Br. at 20. But, that is not the holding of *Cold Metal Process*. While it is true that two separate actions were filed by the parties, there is no indication in any of the reported cases that the two actions were consolidated. Rather, the defendant, United Engineering, originally attempted to assert a counterclaim against Cold Metal Process but the district court dismissed that counterclaim, determining that it was not ancillary to the complaint. *United Eng'g & Foundry Co. v. Cold Metal Process Co.*, 92 F.Supp. 596, 600 (W.D. Pa. 1950). Although United Engineering then asserted its attempted counterclaim as a separate action, the Third Circuit reversed the district court's ruling dismissal of the counterclaim because it erred "in holding that the counterclaim was not ancillary." *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 190 F.2d 217, 222 (3d Cir. 1951). The circuit remanded the case and left open the possibility that United Engineering could seek leave from the district court to file the counterclaim. *Id.*

Five years later, the case made its way to this Court after an appeal following the proceedings on remand. The opening paragraph of this Court's opinion

establishes that the district court must have granted United Engineering leave to file the counterclaim: "[T]he issue before us is whether the [Court of Appeals] has jurisdiction to entertain [an] appeal under 28 U.S.C. § 1291, although an unadjudicated counterclaim awaits disposition in the District Court." *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 446 (1956) (footnote omitted). Thus, by the time the case got to the Third Circuit for the third time and then to this Court, United Engineering was asserting a *counterclaim*, rather than a separate action that had been consolidated with Cold Metal Process' action. The case therefore stands for the [now unremarkable] proposition that the court of appeals had jurisdiction over a judgment adjudicated by the district court and entered in accordance with Rule 54(b) even though the district court had not adjudicated the counterclaim.

In the absence of a determination by this Court that Rule 42 merges consolidated cases into a single "action," Rule 54(b) has no application to petitioner's case.

E. The courts of appeals are well-equipped to address the problems conjured up by respondents and *amici*.

Respondents and *amici* raise the specter of a variety of problems that they envision will arise if Rule 54(b) is not deployed to allow district courts to protect the courts of appeals from final judgments in cases consolidated with other non-final cases. Because, as explained above, 28 U.S.C. § 1291 rather than Rule 54(b) governs petitioner's appeal, even if respondents and *amici* were correct about the benefit of applying

Rule 54(b), their arguments would be to no avail. The benefits and horrors that respondents and *amici* describe, however are largely illusory.

1. Courts of appeals are perfectly capable of deciding whether cases should be consolidated.

Notwithstanding respondents' and *amici's* concerns, the courts of appeals are well-equipped to determine whether to consolidate appeals. Most, if not all, of the courts of appeals already have a local rule in place that requires the parties on appeal to identify cases that are pending that raise similar facts or issues.[15] This allows the courts of appeals to elect to consolidate cases coming up from any district within their supervision. If courts of appeals possess the skill to determine whether cases that are not consolidated at the district court level should be consolidated on appeal, it strains credulity to suggest that those same skills cannot be employed to cases that were consolidated at the district court level. In reality, the courts of appeals are in a *better* position to determine whether cases should be consolidated on appeal because they are more likely to be aware of similar issues pending across their

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[15] For example, 3d Cir. R. 28.1(a)(2) requires the appellant to state "whether the party is aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal." Similarly, Fed. Cir. R. 47.5(b) requires each principal brief to include a statement indicating "the title and number of any case known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal."

respective circuits, whereas a district court's perspective is limited to the cases consolidated before it.

Further, in cases consolidated at the district court level, the courts of appeals will be aided in deciding whether to keep cases consolidated on appeal by the adversarial system. One would logically expect an appellee to move to stay the appeal pending full resolution of the other consolidated cases if the appellee believes that the appeal should not proceed. On the other hand, if both the appellant and appellee believe that the appeal should proceed, the district court's reach should not extend beyond the doors of its own courthouse. *See* Fed. R. Civ. P. 1 (stating that the rules apply to civil actions and proceedings "in the United States district courts").[16]

2. The fear of piecemeal appeals is illusory.

Respondents and *amici* express concern that the courts of appeals will be inundated with "piecemeal appeals" if a party in one consolidated case appeals from a *final* judgment before the remainder of the consolidated proceeding reaches finality. Respondents and *amici* do not define "piecemeal appeals"; but, a

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[16] One can imagine that a party to the unadjudicated case in the consolidated district court proceeding might wish to appeal at the same time. But, that desire is no different than the desire of a litigant in a non-consolidated case who sees a case with a similar issue going up on appeal before his own case has proceeded to final judgment. And the solution is the same—that party can seek leave to participate in the appeal as an *amicus curiae*.

legal issue that comes before an appellate court following a final judgment will not typically present a piecemeal appeal concern. (Legal issues predominate in the courts of appeals because the standard of review for factual findings is so deferential.) If anything, to the extent the legal issue on appeal is also present in the non-final consolidated cases, resolution of that issue on appeal may well help resolve those cases faster, avoid further appeals and expedite the overall conclusion of the litigation.

It is evident from the collective seventy-five year experience of the First and Sixth Circuits,[17] which both follow petitioner's proposed bright line rule, that concern over piecemeal appeals is illusory. Those courts have not suffered ill-effects from piecemeal appeals and no examples from those circuits are offered to show that piecemeal appeals in consolidated cases are a problem.

Relatedly, respondents argue that litigants will attempt to game the appellate process by filing "each claim in a separate suit." Resp. Br. at 28. This argument does not withstand serious scrutiny. First, it assumes that litigants approach the filing of a lawsuit with the belief that they are likely to lose at the trial level. Second, it assumes that litigants will be so confident that they will lose that they will be willing to pay separate filing fees for each claim so that they can

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[17] *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir.1972) and *Kraft, Inc. v. Local Union 327, Teamsters, Chauffeurs, Helpers & Taxicab Drivers*, 683 F.2d 131, 133 (6th Cir. 1982).

go up on appeal faster. Third, it ignores the likelihood that issue preclusion after a claim is litigated will result in the dismissal of the other claims. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 24–27. It would be a poor litigation strategy for a plaintiff to separate its claims: One would expect the weakest claims to be dismissed first; the remaining claims would then be subject to potential dismissal based upon issue preclusion. Fourth, respondents offer no evidence that this strategy has been employed in the two circuits that allow appeals from a final judgment in a consolidated proceeding where the other cases remain pending.[18]

3. District courts could solve many of the "management" issues related to consolidated cases by requiring parties to follow Fed. R. Civ. P. 13(a)(1).

It is ironic that the *amici* extol the virtue of judicial management and appellate gatekeeping by district courts in support of their interpretation of Rule 54(b). It cannot be doubted that in the traditional Rule 54(b) case (an appeal following the entry of a partial final judgment in a single case), district courts serve a

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[18] Respondents instead cite the example of a *pro se* litigant filing ten separate lawsuits in one of the circuits that does *not* allow an appeal from a final judgment if other cases in the consolidated proceeding are pending. *Ivanov-McPhee v. Wash. Nat'l Ins. Co.*, 719 F.2d 927 (7th Cir. 1983). There is nothing in the history of that case that suggests that the plaintiff filed the separate claims for purposes of gaming the system on appeal. It seems more likely that the separate lawsuits were filed because of the plaintiff's lack of experience with litigation.

valuable role as gatekeepers of appeals. Paradoxically, however, one of the main reasons that certain types of consolidated cases present appellate challenges is because district judges fail to enforce the compulsory counterclaim rule, Fed. R. Civ. P. 13(a)(1). The *Gelboim* court took note of such cases: "We need not decide whether or how Rule 54(b) applies to cases consolidated for all purposes involving closely related issues, actions that could have been brought under the umbrella of one complaint." *Gelboim*, 135 S.Ct. at 906 n.7.

The scenario described in *Gelboim* is not unusual. It is common for a party to file a separate action against a party without knowing that the other party has already filed suit over the same dispute. If the party was aware of the other suit, it would be required by Rule 13(a)(1) to file a compulsory counterclaim. When the two cases come before the district court, the court on its own, or sometime on motion or stipulation of the parties, will consolidate the two cases.[19] In such cases, rather than consolidating the two actions, the proper action would be to order one party to assert its claims against the other in a Rule 13(a)(1) compulsory counterclaim and then dismiss the second action. If that practice were followed and the court subsequently issued a judgment as to a single claim or party, such a

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[19] For example, *See Lexington Ins. Co. v. Jacobs Indus. Maint. Co.*, 435 Fed. App'x 144, 146 n.1 (3d Cir. 2011) (describing interpleader action filed by insurance company with the insured commencing a breach of contract action three days later "asserting the same claims" and subsequent consolidation of the two actions by the district court).

judgment would not be a final judgment and could not be appealed absent Rule 54(b) certification. Proper case management at the district court pleading stage can avoid unnecessary consolidations and thereby eliminate the need for gatekeeping at the appellate stage.

F. Respondents' solution leaves appellants in consolidated cases without a bright line rule.

Respondents urge that forcing a party to wait to appeal until an entire consolidated proceeding is resolved creates a bright line rule that is better than the bright line rule proposed by petitioner. Resp. Br. at 40. But, what it actually creates is a trap for the party who receives a final judgment and must await resolution of the consolidated proceeding. What is the triggering event that allows the party to appeal? Respondents assert that the final judgment is the triggering event because "the court cannot resolve the remaining claims in a fully consolidated case without rendering a judgment of some kind. *See* Fed. R. Civ. P. 58(b)." This assertion is incorrect. Rule 58(b) only applies when: a jury returns a general verdict; the court awards costs or a sum certain; or the court denies all relief. The vast majority of federal cases are resolved *without* the entry of a judgment because they settle. When cases settle, parties typically stipulate to a dismissal of the case under Fed. R. Civ. P. 41(a)(1)(A)(ii)—"without a court order."[20]

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[20] Because consolidated cases are not merged, only the parties to a single action need sign the stipulation of dismissal. *See*

An example of the trap demonstrates exactly why respondents' solution is unworkable and is not a true bright line. Suppose Mrs. Doe has had a final judgment entered dismissing her case and is awaiting the disposition of the action that was consolidated with her case. A year after the final judgment was entered in Mrs. Doe's case, the other case is settled and dismissed by stipulation under Fed. R. Civ. P. 41(a)(1)(A)(ii). Mrs. Doe has thirty days "after entry of the judgment or order appealed from" in which to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A).[21] However, there is no order for Mrs. Doe to appeal from when a case is dismissed by stipulation; and in the example, more than thirty days have passed since the entry of

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United States v. Altman, 750 F.2d 684, 695–97 (8th Cir. 1984).

[21] In the effort to address this Court's ruling in *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S.Ct. 13 (2017), which was issued as petitioner was finalizing her principal brief for printing, petitioner overstated the ramifications of that holding and indicated that the deadline for filing an appeal is a "mandatory claims processing rule" rather than jurisdictional. That statement is accurate in the context of appeals in criminal cases because the deadline for filing an appeal is created by rule. *See* Fed. R. App. P. 4(b)(1). Although Fed. R. App. P. 4(a) establishes times for filing an appeal in civil cases, it mirrors the statutory requirements set forth in 28 U.S.C. § 2107. As the civil appeal deadline is created by statute, this Court's prior jurisprudence holding that the deadline to file an appeal in a civil case is jurisdictional, *see, e.g.*, *Browder v. Dir., Dept. of Corrections of Illinois*, 434 U.S. 257, 264 (1978), remains the law. Therefore, the need for a bright line rule establishing when a judgment is final for appeal purposes is all the more essential and "should above all be clear." *Budinich v. Becton Dickinson & Co.* 486 U.S. 196, 202 (1988).

the judgment that dismissed Mrs. Doe's case and she cannot appeal it. Respondents' bright line rule would cost Mrs. Doe her right of appeal.[22]

CONCLUSION

For the foregoing reasons, this Court should hold that the Third Circuit had jurisdiction over petitioner's appeal and therefore reverse the decision of the Third Circuit. It should remand with instructions to the Third Circuit to reach the merits of petitioner's appeal.

Respectfully submitted,

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[22] The same result occurs even if consolidated cases are deemed merged for purposes of Rule 41. Mrs. Doe is dismissed and therefore the remaining parties can dismiss the case without her signature. And, even if the Court orders dismissal under Fed. R. Civ. P. 41(a)(2), that order is not the order that Mrs. Doe "appeals from" and her appeal of the final judgment is still untimely.

Addendum

Statutory Provisions

1. 28 U.S.C. § 2072 (the Rules Enabling Act) provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

No. 16-1150

In The Supreme Court of the United States

ELSA HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHLYN LOUISE HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST,
Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RETIRED UNITED STATES DISTRICT JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a party may appeal as of right from a judgment that resolves some but not all claims in a case consolidated for all purposes pursuant to Federal Rule of Civil Procedure 42(a).

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BRIEF OF RETIRED UNITED STATES DISTRICT JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici, all former United States District Court Judges, have extensive experience managing litigation and deciding case-processing issues involving multiple claims and parties, including motions to consolidate under Rule 42(a) and motions for Rule 54(b)

[1] All parties have consented to the filing of this brief. *See* Supreme Court Rule 37.3(a). No counsel for either party authored this brief in whole or in part, and no person or entity other than the *Amici* or their counsel made a monetary contribution to the brief's preparation or submission.

certification when cases, consolidated or otherwise, involve multiple claims or parties.

The Honorable **Frank C. Damrell, Jr.** served as a United States District Judge for the Eastern District of California from 1997 to 2011.

The Honorable **W. Royal Furgeson, Jr.** served as a United States District Judge for the Western District of Texas from 1994 through 2013.

The Honorable **John Gleeson** served as a United States District Judge for the Eastern District of New York from 1994 through 2016.

The Honorable **Faith Hochberg** served as a United States District Judge for the District of New Jersey from 1999 to 2015.

The Honorable **Barbara S. Jones** served as a United States District Judge for the Southern District of New York from 1996 through 2013.

The Honorable **Stephen M. Orlofsky** served as a United States District Judge for the District of New Jersey from 1996 to 2003 and a Magistrate Judge of that court from 1976 to 1980. Following his resignation from the bench, Judge Orlofsky served as a Special Master and was actively involved in multiple complex consolidated cases.

The Honorable **James Robertson** served as a United States District Judge for the District of Columbia from 1994 to 2010.

The Honorable **Shira Scheindlin** served as a United States District Judge for the Southern District of New York from 1994 to 2016.

Collectively, *Amici* have presided over hundreds of complex consolidated cases and thousands of cases involving multiple claims and parties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief shares *Amici* District Judges' real-world perspective on why partial appeals in fully consolidated cases should be allowed only when certified by the district court. As this Court's precedents and the Federal Rules of Civil and Appellate Procedure recognize, district courts are appropriately vested with great discretion to decide case-management issues, including when to enter final judgment, and whether to certify partial appeals before entry of final judgment on all claims.

The District Judge's settled role as an informed dispatcher of appeals serves the sound administration of justice, given the Judge's intimate familiarity with the parties, procedural history, and—in the case of partial judgments—a still-evolving factual record. Whenever a case involves multiple claims or parties—whether from the outset as framed in the original complaint, as the result of joinder or intervention, or because of consolidation—the District Judge is best-positioned to determine when partial appeal is appropriate.

Amici appear, as many of them did in *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015),[2] to highlight

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[2] Brief of Retired United States District Judges in Support of Respondents, *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015) (No. 13-1174).

for the Court the essential role district court judges play in the federal system as on-the-ground managers of complex litigation and effective dispatchers of appeals. In *Gelboim*, this Court ruled narrowly that, when a party's case is dismissed in its entirety from consolidated multidistrict litigation (MDL) pre-trial proceedings, that fully dismissed party's right to appeal under 28 U.S.C. § 1291 is automatically triggered, even though other cases remain pending in the MDL. The Court's ruling was grounded in the text of 28 U.S.C. § 1407; recognized that consolidation under § 1407 is for pre-trial purposes only; and emphasized the need to provide clear notice to fully dismissed parties in MDL proceedings about when their appeal clock is triggered, given the practical realities of multi-district litigation.

But the *Gelboim* Court expressly declined to rule on the question here: when cases are consolidated for **all purposes**, is there a similar automatic right to appeal a partial judgment when some claims remain pending in district court (often, as here, between the same parties). *See* 135 S. Ct. at 904-905 n.4, 906 n.7. *Amici* District Judges agree with Respondents that automatic early appeal under such circumstances is inappropriate, as it is in any multi-claim action that has been litigated as a single controversy. An automatic immediate appeal of part of the case while the overall litigation is ongoing contravenes the strong federal policy disfavoring piecemeal appeals, circumvents the district court's comparative advantage as dispatcher of appeals, and jeopardizes sound case management.

When claims in a fully consolidated case remain pending in the district court, as a rule no appeal should be allowed until the district court renders a final judgment on all claims. When warranted, early appeals of already-decided claims can be permitted with the District Judge's endorsement that the Rule 54(b) standard is satisfied. But permitting litigants an automatic early appeal of only a subset of claims will disrupt the district court's ability to manage the ongoing case, cause confusion for the parties, and generate all the inefficiencies of piecemeal appeals—including much duplicative and wasteful litigation—with no countervailing benefit. The better approach is to vest the district court—that has been actively managing the litigation and is uniquely positioned to weigh the equities of a partial appeal—with the authority to make the appeal call in the first instance.

ARGUMENT

I. THE DISTRICT COURT IS BEST-POSITIONED TO DETERMINE WHEN PARTIAL APPEAL IS APPROPRIATE IN A FULLY CONSOLIDATED CASE.

At issue here is who should decide whether an appeal is proper when all claims from a member sub-case in a fully consolidated action have been decided, but other claims remain pending—often, as here, between the same parties. District Judges regularly certify partial appeals in all sorts of cases involving multiple claims and parties, drawing upon their proximity, direct courtroom involvement, and immersion in managing the proceedings. In *Amici*'s experience, District Judges are the best actors to serve

as gatekeepers in service of the long-settled federal policy of "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). That is as true for fully consolidated cases as it is for other multi-claim matters.

A. This Court Has Long Recognized the District Court's Comparative Advantage as an Appellate Dispatcher.

Federal appellate jurisdiction turns on the district court's decision—not the litigant's, nor the appellate court's—to "end[] the litigation on the merits and leave[] nothing ... to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Accordingly, a "final decision" under 28 U.S.C. § 1291 is typically one "by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)).

District Judges are charged with this finality determination, and hence the appealability call, with good reason. They play a "special role" in managing ongoing litigation. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Under the federal rules, the district court exercises significant "power ... to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants" and such case-management decisions are left to "the exercise of [the district court's] judgment." *Landis v. North Am. Co.*, 299 U.S. 248, 254-255 (1936) (Cardozo, J.).

The final-judgment rule, under which "a party is entitled to a single appeal, to be deferred until final judgment has been entered" by the district court, *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), protects the autonomy and authority of District Judges in overseeing the litigation process. Section 1291's finality requirement preserves the District Judge's crucial case-management role, because allowing piecemeal appeals while the underlying litigation continues "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges" to manage their dockets. *Mohawk*, 558 U.S. at 106-107 (quoting *Firestone Tire & Rubber Co.*, 499 U.S. at 374).

In rare cases, it serves the administration of justice to permit early appeals of some, but not all, claims in an ongoing matter. Federal Rule of Civil Procedure 54(b) thus allows a district court "dealing with multiple claims or multiple parties" to direct the entry of partial final judgment upon an "express determination that there is no just reason for delay," when "the interest of sound judicial administration" and "the equities involved" so require. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 1, 8 (1980).

Under Rule 54(b) the District Judge serves as a "dispatcher" of appeals, to "meet the demonstrated need for flexibility" in certifying partial judgments. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). This decision is, "with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Id.* at 437. As this Court has recognized, the required "task

of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case." *Curtiss-Wright*, 446 U.S. at 12. *See also* 15A Wright & Miller, Federal Practice and Procedure § 3914.7 (2d ed. 1992) ("The choice to use the district judge as the 'dispatcher' who determines the desirability of immediate appeal takes advantage of the judge's close familiarity with the case.").

Rule 54(b) certifications (or the denial thereof) are reviewed by the Courts of Appeals under the highly deferential abuse-of-discretion standard. *Sears*, 351 U.S. at 437; *Allis-Chalmers Corp. v. Phil. Elec. Co.*, 521 F.2d 360, 363-364 (3d Cir. 1975). This well-established standard of review reveals, as well, this Court's judgment that the district court "is better positioned ... to decide the issue in question,"—i.e., whether immediate appeal of some, but not all, of the claims in ongoing litigation should be allowed. *Miller v. Fenton*, 474 U.S. 104, 114 (1985); *see also McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1166-1167 (2017); *Pierce v. Underwood*, 487 U.S. 552, 560 (1988).

In sum, both the Federal Rules and this Court's precedents recognize the district court's superior vantage point for engaging in the partial-appeal calculus, which requires fact-based judgment calls grounded in intimate procedural knowledge of the ongoing litigation, a sense of how the record is likely to evolve, and on-the-ground assessments of the litigants' likelihood to engage in gamesmanship. Such battlefield decisions are best made by the one observing the combatants. First-hand knowledge of all that has transpired, and what is likely to come next, allows the district court, in "a practical manner,"

to "properly tim[e] the release of final decisions in multiple claims actions." *Sears*, 351 U.S. at 438.

B. The District Court's Comparative Advantage as an Appellate Dispatcher Is Equal or Greater in a Fully Consolidated Case.

When the litigation at hand involves multiple claims because of the District Judge's own decision to consolidate separate cases, it makes even more sense for that same judge to make the call on whether, and when, to unravel any particular subset of claims for early appeal. *Cf. Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956) (whether compulsory or permissive, counterclaims are not to be evaluated differently from other claims in the district court's Rule 54(b) determination).

Any other rule effectively allows the parties to circumvent the district court's consolidation ruling; is unnecessary because Rule 54(b) works in the consolidated-case context to allow warranted partial appeals to move forward; and merely shifts the case-management burden to the court of appeals, which is ill-equipped to decide such case-bound issues in the first instance.

1. The district court's significant power to manage its docket includes the decision whether to consolidate cases under Federal Rule of Civil Procedure 42(a). What's more, "[t]he trial court's managerial power is especially strong and flexible in matters of consolidation." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013). To take the decision whether to release a subset

of claims for early appeal from "the district court that made the original decision to consolidate" jeopardizes this case-management authority. *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984). Requiring an early appeal of a subset of claims in a consolidated case simply because they comprise a particular sub-case, absent district court certification under Rule 54(b), would effectively allow litigants to circumvent the district court's consolidation ruling.

This undermines the district court's exercise of discretion in consolidating the cases to begin with, and allows the appellate court to prematurely second-guess the consolidation order before the proceedings have concluded, without the benefit of any reasoned opinion from the District Judge about the propriety of an early partial appeal. That second-guessing is all-the-more dissonant with sound principles of case management because orders granting or denying consolidation are typically not appealable.[3]

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[3] *See, e.g., Travelers Indem. Co. v. Miller Mfg. Co.*, 276 F.2d 955 (6th Cir. 1960); *Skirvin v. Mesta*, 141 F.2d 668, 671-672 (10th Cir. 1944); *Nolfi v. Chrysler Corp.*, 324 F.2d 373, 374 (3d Cir. 1963); *Alpine Glass, Inc. v. Country Mut. Ins. Co.*, 686 F.3d 874 (8th Cir. 2012); *Crum v. Atty. Gen. of the U.S.*, 187 Fed. App'x 316, 317 (4th Cir. 2006) (unpublished); *NAACP of La v. Michot*, 480 F.2d 547, 548 (5th Cir. 1973); *Levine v. Am. Export Indus., Inc.*, 473 F.2d 1008, 1008-1009 (2d Cir. 1973). Appellate courts retain interlocutory supervisory power over consolidation decisions via writ of mandamus, *see In re Repetitive Stress Injury Litig.*, 35 F.3d 637 (2d Cir. 1994), or under 28 U.S.C. § 1292(b), *see* Resp. Br. at 43 n.6. When Rule 42(a) consolidation determinations are reviewed after final judgment on all claims, appellate review is appropriately conducted under the abuse-of-discretion standard.

In the usual case, "[a]ppellate courts may not create jurisdiction by entering judgments on behalf of the district courts and then reviewing those judgments." *Middleby Corp. v. Hussman Corp.*, 962 F.2d. 614, 615-616 (7th Cir. 1992). Because the district court's decision to consolidate cases for all purposes already reflects a measured determination that the claims are best decided as a single controversy, this rule should apply with added force in fully consolidated cases. Only the District Judge should be able to override that determination before final judgment on all claims. Especially because "[t]he relationships that justify consolidation for trial often make consolidation on appeal desirable as well." Wright & Miller, *supra*, § 3914.7.

Because a fully consolidated case is "in practical consequence, but a single controversy," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974), the relevant question for appellate jurisdiction is not whether litigants declare themselves ready for an appeal on some subset of that controversy, but rather whether the district court's supervision of the litigation is complete. *See Cobbledick*, 309 U.S. at 326. And who better to make the decision when to "disassociate[] itself from the case," *Swint*, 514 U.S. at 42, than the District Judge that has been actively involved in managing the litigation since its inception.

2. Rule 54(b) works. District Judges are using it to effectively dispatch partial appeals in consolidated cases. Examples abound of district courts judiciously

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E.g., *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1313 (11th Cir. 2017).

applying Rule 54(b) in fully consolidated cases. In doing so, they draw upon their superior vantage point and hands-on knowledge of highly case-specific factors to weigh competing interests, and dispatch early appeals only when disentangling a subset of claims for early appeal comports with the sound administration of justice.

Thus, district courts regularly deny 54(b) certification in consolidated actions, as in other multi-claim actions, when, "the best way to ensure a timely resolution of ... closely intertwined claims ... is through the prompt trial of the remaining claims in [the] case, followed by a single consolidated appeal of any issues which have not been rendered moot by the trial of these remaining claims." *Ely v. Cabot Oil & Gas Corp.*, No. 3:09–CV–2284, 2015 WL 1963108, at *4 (M.D. Penn. May 1, 2015). *See also, e.g., Himark Biogas, Inc. v. W. Plains Energy LLC*, No. 14-1070-SAC, 2016 WL 3654764 (D. Kan. Jul. 8, 2016) (denying Rule 54(b) certification on arbitration award when patent cases remain pending and are related in an "unsettled" way to the resolved claims); *R. M-G, v. Las Vegas City Sch.*, No. CIV-13-0350, 2016 WL 10592142, at *3-4 (D.N.M. Feb. 25, 2016) (denying 54(b) certification because, *inter alia*, "there may be subsequent appeals related to [plaintiff's] damages claims in this case, [and] the Court is not confident that the Tenth Circuit will not have to revisit the facts and remaining legal issues of this case more than once"); *U.S. Bank Nat'l Ass'n v. Londrigan*, No. 15-3195, 2016 WL 6267933, at *2 (C.D. Ill. Oct. 1, 2016) (denying 54(b) certification in a consolidated action because "although the claims in the two cases were different, many of the factual allegations ... are very

similar or the same, ... [and] future developments in this case could moot the need to review").

But where the balancing of competing interests tips the other way, and District Judges "find no just reason to delay," they readily dispatch partial appeals under Rule 54(b). And in such instances, the certification is accompanied by a well-reasoned opinion that provides the dispatcher's experience-grounded analysis to the appellate court. *E.g.*, *Bunch v. Frank*, No. 1:14-CV-438-WTL-DKL, 2017 WL 67841, at *2 (S.D. Ind. Jan. 6, 2017) (54(b) certification issued when the sole claim at issue was a legal issue, dissimilar from unadjudicated claims; it was "unlikely that the appellate court would have to consider the similar issue a second time should the summary judgment order be reversed[;] ... [and] judicial economy would best be served by having the appellate court decide the issue ... before proceeding to trial against the [remaining] defendants"). Other examples of Rule 54(b) being effectively used to dispatch early appeals in litigation consolidated under Rule 42(a) include: *Allen v. Mayberg*, 577 Fed. App'x 728, 731 (9th Cir. 2014), and *Bayer Healthcare Pharm. v. Watson Pharm.*, 713 F.3d 1369, 1373 n.3 (Fed. Cir. 2013).

3. Under anything other than a bright-line rule that an early appeal in a fully consolidated case requires the district court's Rule 54(b) imprimatur, the system breaks down.

When undertaking deferential review of the grant or denial of a Rule 54(b) motion, the courts of appeals benefit from a reasoned explanation of why, after "weighing and balancing the contending factors,"

Curtiss-Wright, 446 U.S. at 12, the district court deemed it appropriate to dispatch one or more claims, but not all, for immediate appellate review. And as with other fact-bound determinations, the "proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure the conclusions derived from those weighings and assessments are juridically sound and supported by the record." *Id.* at 10.[4]

Such allocation of comparative judicial effort makes sense. The district court's proximity to the parties and day-to-day supervision of the case makes it uniquely situated to determine which claims, if any, can be properly disentangled for appellate review before final judgment. Balancing the costs of delaying review on a sub-set of claims against the benefits of a more fulsome record for the appellate court on all claims (or the possible mooting of the need for appeal entirely) is a decision "peculiarly ... for the trial judge." *Id.* at 12.

But for litigant-driven appeals that are bereft of the district court's analysis of highly case-specific factors, the reviewing court becomes one of first view rather than review, asked to rule in the first instance

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[4] Insufficient explanation can be grounds for the appellate court to find no jurisdiction, because "a proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of 'no just reason for delay.'" *Allis-Chalmers*, 521 F.2d at 364. *See also, e.g., Stockman's Water Co. LLC v. Vaca Partners, L.P.*, 425 F.3d 1263 (10th Cir. 2005) (appellate jurisdiction declined because Rule 54(b) certification order inadequate).

on case-management issues well outside its bailiwick. This is true whether the court of appeals' case-management function falls under the rubric of a case-by-case approach to finality, or under Petitioner's proposed rule (Pet'r Br. 13-15) that would deem every sub-case judgment final but require the court of appeals to take on time-consuming docket-management duties through orders to stay appeals or hold them in abeyance. Either approach turns upside down "the simple, definite, workable rule," provided by Rule 54(b), that appeal does not lie absent a final decision declared by the district court, and defeats the rule's "re-establish[ment of] an ancient policy with clarity and precision." Fed. R. Civ. P. 54(b) advisory committee's note to 1946 amendment.

The district court's strong comparative advantage in weighing the competing equities of partial appeals underpins the "virtually unanimous" rule in the courts of appeals that, for fully consolidated cases, Rule 54(b) certification is required to allow an appeal before final judgment on all claims. Resp. Br. at 2; *accord* Pet'r Br. 7-8 (conceding that many circuits apply a strong or irrebuttable presumption that cases consolidated for all purposes are not immediately appealable); *see also* Resp. Br. at 14 & n.2 (collecting cases).

Some circuits, however, have adopted a case-by-case approach to determine finality and appealability of partial judgments in cases that are consolidated to any degree. When applying case-by-case factors in the first instance, the courts of appeals are not playing their "proper role" of deferentially reviewing the district court's informed assessment. *Curtiss-Wright*,

446 U.S. at 10. Rather, they are starting from scratch, and working from a cold and incomplete record to apply factors indistinguishable from those that District Judges regularly consider under Rule 54(b). The same would be true under Petitioner's proposal: forcing the courts and parties to determine whether a stay is appropriate at a very early stage in the appeal when the reviewing court is utterly unfamiliar with the issues.

Tales from decisions applying the case-by-case approach to partially consolidated cases illustrate the difficulties. For example, when deciding whether to accept appellate jurisdiction over a litigant-initiated appeal of a member case when the rest of the partially consolidated litigation remains pending, the Fourth Circuit considers: "(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time ... [and] ([4]) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like." *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 39 n.5 (4th Cir. 1993).

If this list sounds familiar, that's because it is. The Fourth Circuit's partial-appealability factors are drawn directly from the well-worn *Allis-Chalmers* factors that govern the district court's Rule 54(b) analysis. *Compare* 11 F.3d at 39 n.5 *with* 521 F.2d at 364. *Accord Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996) (recognizing "separateness of the

claims" is a factor both in Rule 54(b) analysis and in the case-by-case appealability analysis undertaken by some circuits). It is a waste of judicial resources to have circuit courts undertake this case-specific, fact-bound analysis in the first instance. *See, e.g., McCullough v. World Wrestling Entm't, Inc.*, 838 F.3d 210, 213 n.5 (2d Cir. 2016) (dismissing appeal of two of six cases from a consolidated proceeding only after engaging in a laborious analysis).

A rule requiring Rule 54(b) certification to allow any partial appeal to go forward in a fully consolidated case would avoid this needless appellate effort. Particularly where the application of Rule 54(b) depends "upon the extent and purposes of the consolidation," *Lewis Charters, Inc., v. Huckins Yacht Corp.*, 871 F.2d 1046, 1048-1049 (11th Cir. 1989), who better to decide if partial appeal is warranted than the District Judge who first consolidated the cases and knows why she did so? Yet circuits would be left to decide this and other case-specific factors with no guidance from the district court under Petitioner's proposal requiring extensive appellate case management of automatically final sub-case judgments.

Such irrational allocation of judicial resources can be avoided by adopting a general rule that Rule 54(b) certifications are required for immediate appeal when a sub-case is dismissed from fully consolidated proceedings and other claims remain pending.

II. REQUIRING AUTOMATIC APPEALS OF PARTIAL JUDGMENTS IN FULLY CONSOLIDATED CASES WOULD WREAK HAVOC WITH EFFICIENT CASE MANAGEMENT.

So long as the district court retains its authority to act as appellate "dispatcher" in fully consolidated cases before final judgment is rendered in the full consolidated case, the district court can balance the "competing considerations underlying all questions of finality," which are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen*, 417 U.S. at 171 (internal quotation marks omitted).

Under a rule that inexorably requires immediate appeal of the resolution of any separate complaint within a fully consolidated case, however, there is no balance. Rather, the inconvenience and costs of piecemeal review are imposed in every case, whether there is any countervailing need or other benefit to the parties. Because district courts can and do enter Rule 54(b) judgments in fully consolidated cases warranted, the only additional appeals sent to the court of appeals under Petitioner's automatic-early appeal approach are necessarily those appeals that cause inefficiency and disrupt case management with little to no countervailing benefit.

The final-judgment rule "serves several salutary purposes," including "'promoting efficient judicial administration'" and avoiding "'undermin[ing] the independence of the district judge.'" *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-204 (1999) (quoting *Firestone Tire & Rubber Co.*, 449 U.S. at 374).

Requiring immediate appeals any time a district court order disposes of the claims in one sub-case within a fully consolidated case serves none of these goals, and instead undercuts them.

A. As for efficient judicial administration, the rule advocated by Petitioner is sure to create *in*efficiency in terms of wasteful re-litigation of the same issues, needless jousting over unclear appellate jurisdiction, and unnecessary appellate decision-making on issues mooted by further proceedings in the district court.

To start, in the vast majority of cases in which Petitioner's proposed rule requires an appeal that would not otherwise have been dispatched by the district court under Rule 54(b), the appellate court will be required to "decide the same issues more than once" in subsequent appeals—precisely the result that the district court's Rule 54(b) discretion is designed to guard against. *Curtiss-Wright.*, 446 U.S. at 8. Such inefficiency will likely be the rule, not the exception, given the usual factual or legal overlap in cases that are consolidated for all purposes. A Rule 54(b) judgment is rarely entered appropriately when the same parties are still litigating related claims in the district court. *See Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 630 (9th Cir. 2015) (rejecting 54(b) judgment where an appeal did not "resolve all of the [particular] plaintiffs' claims" because "[i]t will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain, simultaneously, contestants below") (internal quotation marks and citation omitted). But under Petitioner's rule, there would be no choice.

Courts of appeals have dodged the repeat litigation that would result from Petitioner's rule by treating a fully consolidated case as an action requiring a Rule 54(b) judgment for partial appeals. *See, e.g.*, *Doe v. Howe Military Sch.*, 227 F.3d 981, 985, 987 (7th Cir. 2000) (treating a fully consolidated case involving two different plaintiffs alleging sexual harassment as a single case to avoid "successive appeals on identical issues" in light of the "tremendous overlap" in the cases); *Rd. Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.*, 967 F.2d 145, 151-152 (5th Cir. 1992) (two consolidated actions "both arose out of the single employer/alter ego issue and their theories of recovery are virtually identical"); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) ("crux of both actions" was the same in two actions that were consolidated). But because Petitioner's partial-judgment-always-final rule sidesteps the district court's Rule 54(b) ability to assure that "there is a well developed record to support [an appellate] decision," Wright & Miller, *supra*, § 3914.7, the reverse will be true. Duplicative appeals are likely to occur in a context where the first appellate decision is based on the least-developed record,

Compounding these problems is the likelihood that a rule requiring immediate appeal in each sub-case will create uncertainty about appeal timing and therefore "eat[] up time and money as the parties litigate, [appellate jurisdiction,] not the merits of their claims." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010); *see Huene*, 743 F.2d at 704 ("[U]ncertainty as to the finality of the judgment could lead to the premature filing of a notice of appeal with the consequent waste of time and resources."). Even a purportedly bright-

line rule that judgment of each member case of a consolidated case triggers the time for filing an appeal will often leave murky whether a particular district court order finally and conclusively resolved all of the claims in a particular sub-case.

For example, if the district court enters orders that seriatim address particular types of claims from a number of sub-cases, and the district court does not maintain separate dockets, it may be difficult for the parties to determine when all of the claims stemming from a single complaint have been finally resolved, as there may be no separate judgment entered for a single case that has been fully consolidated with another. *Cf. Doe*, 227 F.3d at 985-987 (noting that the claims in one of two consolidated cases were dismissed over the course of three separate orders and no judgments were entered under Rule 58 until the conclusion of the entire consolidated case, with language that "confused matters").

Under the contrary rule, where Rule 54(b) certification is required to appeal a subset of claims, parties in fully consolidated cases face no such "quandary about the proper timing of their appeals." *Gelboim*, 135 S. Ct. at 905. Even when all the claims in one member case have been completely dismissed, it will be very clear when the time for appeal begins to run: when final judgment has been entered on all claims in the consolidated case unless the District Judge expressly certifies as final a sub-set of claims.

Beyond unnecessary litigation on threshold appealability issues, Petitioner's rule would generate wholly unnecessary appeals on the merits, too. As issues are often intertwined in cases consolidated for

all purposes, Petitioner's rule could easily result in appellate decisions that are subsequently mooted by the continuing proceedings in the district court.

Those appellate courts that have required a Rule 54(b) judgment or a final judgment in the entire consolidated case before allowing appeal have been able to avoid such potential mootness. *See, e.g.*, *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 497–98 (2d Cir. 2010) (holding immediate appeal not available for judgment "dismissing one of two cases that were consolidated for all purposes" when second case still pending in district court and "resolution of the pending action could moot the central issue in this appeal"); *Eggers*, 11 F.3d at 39 (holding appeal on widow's claim must await resolution of still-pending deceased miner's claim in fully consolidated case because if miner's claim allowed, widow would receive benefits under that claim, mooting appeal on widow's claim).[5] Under a rule requiring parties to file appeals as soon as any one member case in a fully consolidated case was resolved, early appeals that were later mooted would likely proliferate, as would duplicative or otherwise wasteful

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[5] This is consistent with the rule applied by most courts of appeals that a Rule 59 motion by one party in a fully consolidated case tolls the time for filing an appeal from any judgment in the consolidated case. *See, e.g.*, *Advey v. Celotex Corp.*, 962 F.2d 1177, 1180 (6th Cir. 1992). Like other proceedings ongoing in the district court, that court's ruling on a Rule 59 motion in one part of a consolidated case could obviate the need for appeal of another, related part of the case. *Cf. Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 59 (1982) (per curiam) (noting that Rule 59 motion can "prevent unnecessary appellate review").

litigation of all kinds. Such results undermine judicial economy.

B. The pervasive, negative effect on efficient judicial administration is not the only downside to Petitioner's proposed rule. That rule would also undercut the District Judge's independence and disrupt her ability to manage the remainder of the litigation.

Ordinarily, the district court retains authority to revise "any order or other decision, however designated," that adjudicates fewer than all claims in a case, at any point prior to entry of final judgment "adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Deeming "final" any order resolving all claims in a particular member case eliminates this revision authority, reducing the district court's flexibility to narrow the issues through initial orders that remain subject to revision or reopening depending upon other developments—like a substantially different factual record than expected being developed at trial on a closely related claim. Imposing final-judgment rigidity on any orders disposing of all claims in a member case—notwithstanding the close relationship of those claims to others in a different part of the consolidated case—will likely require district courts to leave more issues open and unresolved further into the litigation. And it will certainly reduce the district court's ability to flexibly and effectively manage the case.

More troubling still is the risk of inconsistent, conflicting judgments resulting from the court of appeals and the district court exercising simultaneous jurisdiction over intertwined claims. Ordinarily, "a

federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously," and the filing of a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. In practical reality, however, Petitioner's rule would lead to de facto simultaneous jurisdiction in many consolidated cases. Although the identical claims might not be at issue in both courts, substantially similar and overlapping claims likely would be, with the concomitant possibility of divergent results.

Rule 54(b) affords the district court a flexible and nuanced case-management tool that allows partial early appeal only when the District Judge is assured that a subset of claims can be safely disentangled from the ongoing litigation. And, when appropriate, interlocutory appeals under § 1292(b) or petitions for mandamus likewise allow for appellate review of pressing issues that cannot await final resolution of all claims. But under Petitioner's rule—where litigants of dismissed member cases have an immediate appeal of right—the district court's only case-management tool for avoiding simultaneous consideration of materially identical issues would be to put the rest of the case on hold. This blunt instrument is a poor substitute and will engender unwarranted delay compared to a thoughtful application of Rule 54(b).

Application of the mandate rule—the controlling force of the court of appeals' decision in a case, Wright & Miller, *supra*, § 4478.3—also becomes more complicated when both district court and appellate court are simultaneously deciding overlapping cases.

If the appeal of a sub-case from a consolidated case is an independent final-judgment appeal, then the court of appeals' judgment in that independent appeal might, or might not, yield a mandate for the rest of the consolidated case. That raises a serious risk of divergent judgments for nearly identical issues. And even if the court of appeals' judgment in the first piecemeal appeal *does* constitute law of the case for the rest of the consolidated case, it still may not control the further proceedings in the district court. Law of the case may not apply because new factual findings from an evolving record in the ongoing proceedings can undermine the "correctness of an appellate decision on the basis of information that was not before the appellate court." *Id.* The possible result is a district court judgment that is arguably inconsistent with the appellate mandate. This risk of dissonant judgments is all-the-more likely when district court litigation proceeds simultaneously with an appeal of one part of a fully consolidated case in isolation.

Worse still, such confusion about how partial appellate judgments affect ongoing litigation in the district court will likely yield more wasteful litigation. If a party believes that the district court's decision on a related claim does countermand the mandate in one of the piecemeal appeals from the consolidated case, there will be more litigation related to the timing of the mandate and the inter-relationship of the judgments. Yet another example of unnecessary litigation is thereby spawned by eliminating the district court's authority to determine when it is appropriate for judgments resolving only part of a consolidated case to be "dispatched" for appeal.

In sum, the district court is in the best position to be a vigilant steward of the resources of the courts and the parties, to ensure the efficient administration of justice, and to effectively manage the case. The determination of when a judgment becomes final and appealable for one part of a case consolidated for all purposes should reflect that reality.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted.

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